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In The

Supreme Court of the United States

JOSEPH SMITH and SONYA SMITH,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the rebuttal portion of closing argument, the prosecutor staged a birthday party for the deceased victim complete with cake, candles, singing, and dimmed lights; none of these acts were related to any evidence or issue of the trial.

1. Whether planned, intentional conduct by a prosecutor in closing argument to inflame the jury's sympathy can so inflict a trial with unfairness creating a due process violation that requires a trial judge to stop the conduct *sua sponte*.

2. Whether defense counsel rendered ineffective assistance under the Sixth Amendment to the Constitution when counsel failed to object to the appeal to juror sympathy and trial counsel could only offer a talismanic and unreasonable justification of "strategy/tactics" for the failure to object.

PARTIES TO THE PROCEEDING

Petitioners are Joseph Smith and Sonya Smith. They are defendants in the Circuit Court of Cobb County, Georgia and the appellants in the Supreme Court of the State of Georgia.

Respondent is the State of Georgia.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review a decision of the Georgia Supreme Court.

OPINIONS BELOW

The opinion of the Georgia Supreme Court (App. at 1) for which this petition is filed is reported at 2010 Ga. LEXIS 838.

JURISDICTION

The Georgia Supreme Court entered its order and opinion on November 8, 2010. The case is docketed in the Georgia Supreme Court as Nos. S10A1281 and S10A1282. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. Under 28 U.S.C. § 1257, this Court may grant a petition for a writ of certiorari to review any case that is the final judgment rendered by the highest court of a State where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

2. The Fourteenth Amendment of the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

The Georgia Supreme Court in a 5-2 decision criticized but took no action on the issue of a prosecutor inflaming the passions and sympathies of jurors by bringing to court a birthday cake, turning the lights down, setting fire to the candles, and then ***singing***[1] several lines of "Happy Birthday" to the deceased victim while reminding the jury that the victim did not see his next birthday. This is the type of event where defense counsel cannot expect the jury to reasonably ignore nor will defense counsel's silence prevent further attention being drawn. The decision by the Georgia Supreme Court is contrary to letter and spirit of the Sixth and Fourteenth Amendments to the United States Constitution.

[1] Counsel has searched diligently for a criminal trial involving a prosecutor singing as part of argument; no such case has been found.

It should shock the conscience of this Court to know that in a criminal trial where a party faces a life sentence, an assistant district attorney can intentionally inflame a jury with singing and lighting a cake to the deceased victim in the rebuttal portion of closing argument, and the lower courts refuse to recognize the denial of a fair trial. The Georgia Supreme Court acknowledges that the closing argument was inappropriate, but evades providing a remedy primarily on the grounds that there was no objection and that counsel's failure to object was a tactical decision to either 1) avoid appearing disruptive to the jury or 2) in the mere hopes that without comment from counsel or the trial court, the jury will be offended by an overly aggressive prosecution. The essence of injustice is a recognized wrong that goes without remedy.

This Court should review this case because the "over-the-top" conduct in closing argument was an assault on justice in criminal trials where there is a need to prevent trending prosecutorial overreaching in closing arguments. The Court would not only address the need of preserving the dignity of the justice system, but more importantly, the Court would address the issues of ensuring fairness in criminal cases by setting the standards for closing argument as well as setting the standards for when counsel may hide behind a claim of strategy or tactics when counsel fails to object.

The issue of prosecutorial misconduct in closing argument is a commonly occurring problem in

criminal trials. This case, given its obvious misconduct, affords the opportunity to address the numerous cases that discuss the issue and to standardize the manner of analysis by both state and federal courts.

The Supreme Court of Georgia's decision presents an important question concerning the assertion of trial counsel that they acted with a strategic or tactical purpose which would negate a claim of ineffective assistance of counsel ("IAC") based on failure to object to prosecutorial misconduct in closing argument. The mere assertion of "strategy" or "tactics" becomes a talisman rendering an IAC claim for failure to object pointless unless this Court provides guidance as to when such strategy or tactics are reasonable.

STATEMENT OF THE CASE

A jury trial began on February 5, 2007 and ended on February 14, 2007 before Judge James Bodiford in Cobb County, Georgia. The evidence presented at trial follows.

At 10:11 p.m. on October 8, 2003, emergency responders received a 911 call from the Smiths' residence at 611 Factory Shoals Road in Cobb County, Georgia. Police and medical personnel arrived and found eight-year-old Josef Smith lying on the kitchen floor. Josef was not breathing and he had no circulation. The first medical responders asked Josef's parents how this happened. Both Sonja and Joseph

Smith said that Josef was having fits, leading the medical technicians to believe Josef had a seizure. The medical personnel who treated Josef observed what appeared to be injuries covering his face, back, chest, legs, and buttocks.

The emergency medical personnel rushed Josef to a hospital emergency room. The doctors declared him dead on October 9, 2003, the following evening.

Sonya Smith talked with the police in the early hours of October 9, 2007, while her son was being treated. She said that Josef had acted up on October 8th, but having calmed down after going to his room, he rejoined the family for a prayer session. Following the prayer, the other family members got back up. But Josef stayed down and appeared to be overheating. Mrs. Smith told the police that on October 8, 2003, Josef was misbehaving and having tantrums. She admitted to corporal punishment earlier that day by giving the boy a spanking with a glue stick on his buttocks. She said that night the family participated in an internet church service using a laptop computer in their kitchen. At one point, they all knelt to pray, but when the rest of the family stood up, Josef stayed down.

The Cobb County Medical Examiner, Dr. Brian Frist, performed Josef's autopsy on October 10, 2003 and opined that Josef was hit multiple times on both sides of his head, under his chin, and in the mouth. Dr. Frist believed that Josef died "as a result of the trauma to his head in association with the brain

swelling which is also associated with the acute and chronic nature of bruises and contusions to his body."

Dr. Kris Sperry, the Chief Medical Examiner for the State of Georgia, initially concurred that the complications of head injuries caused Josef's death, but Dr. Sperry believed that asphyxiation more likely explained Josef's death. The State also presented a theory that the deceased victim had been tied up in a box as a punishment to change his behavior based on testimony of victim's brother. This theory was not even considered until two years after the child's death based on the testimony of his brother. The State's theory was that the child may have suffocated while tied up in the box.

The Defense would present a claim centered on the cause of death being attributable to staph infection from the scratch wounds due to eczema rather than any human caused injury. Dr. Cheryl Burgess, an Assistant Clinical Professor at Georgetown University and George Washington University, testified that the wounds and markings on the victim's body were due to eczema and scratching associated therewith. Dr. Burgess noted that based on the white blood cell count and the fever of 102.5 degrees, an infection was present in the child.

Dr. Thomas Sporn, an assistant professor in Pathology at Duke University and former Assistant Chief Medical Examiner for the State of North Carolina, testified on behalf of the defense. Based on his review of the autopsy reports, glass slides taken by the pathologist, photographs, and other documentation, Dr. Sporn rejected Dr. Frist's theory of blunt

force injuries to the head. Dr. Sporn acknowledged it would be difficult to put "a struggling, healthy child in a box with dimensions" as the box shown in the courtroom. He noted the lack of trace evidence on the body such as flecks of paint or wood splinters that would be expected if the body had been placed in the box, which was the State's theory as to the cause of death.

In the rebuttal portion of closing argument, the Assistant District Attorney said and sang (the singing portion will be in italics) the following while an actual birthday cake and eight candles were burning, having been lit by State's counsel:

> I was thinking about something the other day. I was thinking about birthdays. *Happy birthday to you. Happy birthday to you. Happy birthday dear Josef. Happy birthday to you.*
>
> There are eight candles on that cake. But you know what's not on there? One more candle for his 9th birthday, because he didn't get to see that. You may think that's harsh, but it's true. And it was at the hands of those people.
>
> You are the voice of the community. You can stand up and say to Cobb County, We do not let parents abuse their children to the point in which they die. You, as the community, can say that. We don't accept this behavior in our community. This is not what we do to children.
>
> When you were sworn in as jurors, you took an oath to render a verdict which speaks the truth. And a verdict which speaks the truth

> in this case is a verdict of guilty on each and every count in the Indictment. Speak the truth for little Josef.

The jury returned a verdict finding the Smiths guilty of Involuntary Manslaughter, Felony Murder, 3 counts of Cruelty to Children in the First Degree, 3 counts of Aggravated Assault, 1 count of False Imprisonment, and a lesser-included misdemeanor offense of Reckless Conduct. On March 27, 2007, the trial court sentenced the Appellant to an effective sentence of life plus 20.

The Smiths filed timely motions for new trial. On February 5, 2009 and February 20, 2009, Judge Bodiford heard the motion for new trial and subsequently ordered further briefing. Judge Bodiford issued an Order denying New Trial on October 8, 2009. Joseph and Sonya Smith filed their Notice of Appeal to the Georgia Supreme Court on October 19, 2009.

On November 8, 2010, the Georgia Supreme Court affirmed the trial court's order denying a new trial in a 5-2 decision with a strong dissent by the Georgia Supreme Court Chief Justice. This case is before the Court on a direct appeal from state court for direct review of the merits of the case that might be hampered by further legal process.

REASONS FOR GRANTING THE WRIT

1. This case affords the ideal opportunity to address the prosecutorial misconduct in a closing argument where the prosecutor deliberately stages conduct and words calculated to appeal to jurors' emotions because the Georgia Supreme Court opinion conflicts with other jurisdictions.

In the present case, the prosecutor pre-planned a birthday party by purchasing a cake and candles for the sole purpose of inflaming jurors' emotions. This planned appeal to sympathy was not inadvertent, brief words, but rather a lengthy consumption of the court's time with lights dimmed and fires lit in the courtroom along with singing. Yet without guidance from the United States Supreme Court, the trial judge and the Georgia Supreme Court did not find this improper conduct (as it was so found by the Georgia Supreme Court) justifying the trial court stopping said conduct with or without defense counsel objection. As Chief Justice Hunstein's dissent noted:

> **There was *no legitimate reason* for what the prosecutor did.** It was neither argument nor rebuttal, because there is nothing at all in the record about birthdays and birthday cakes to raise even the slightest possibility that the prosecutor was drawing a reasonable inference from the evidence presented or the arguments made by defense counsel. . . . The prosecutor's birthday production was not meant to be argument or rebuttal: it was a theatrical stunt spun out of

> pure fantasy. Its sole purpose was to prejudice the rights of appellants before the jury in an impermissible attempt to invoke the jury's passions and divert the jury from the evidence. ***It offended the dignity and decorum of the court and violated every precept of professionalism and fair play. Yet the trial court did absolutely nothing.*** The event played itself out without the trial judge performing his duty to maintain decorum in the courtroom.

(App. at 20-22) (footnotes omitted) (emphasis added).

The very outrageous nature of staging a birthday party to a victim violating the defendants' due process rights invites rhetorical hyperbole which would only be accurate in its condemnation. This Court has the opportunity to provide guidance of wide application to every closing argument in criminal trials throughout the country. Thus, this issue has an impact on a national scale.

The guidance is needed when the confusing nature of existing caselaw is considered. In many instances, acts not as glaringly unfair as the "birthday party to the deceased" have resulted in reversal.

The Minnesota Supreme Court explained in *State v. Ramey*, 721 N.W.2d 294 (Minn. 2006), the prosecutor's improper conduct amounts to plain error when a prosecutor engages in clearly proscribed conduct. "Reducing the incidence of prosecutorial misconduct is a shared obligation and trial courts have a duty to intervene and caution the prosecutor, even in the

absence of objection." *Id.* In *Ramey*, the Defendant was convicted of violating a protective order. On appeal, the Defendant claimed, *inter alia*, that the prosecutor committed misconduct by improperly injecting personal opinion into closing argument and vouching for witnesses. Despite the lack of objection, the *Ramey* court applied a plain error standard for review of prosecutorial misconduct and reversed the conviction.

The Minnesota Supreme Court held that an unobjecting defendant bears the burden of demonstrating that the prosecutor's conduct constitutes an error that was plain. *Ramey*, 721 N.W.2d at 302. The burden then shifts to the State to demonstrate that the conduct did not affect the defendant's substantial rights. *Id.* Finally, if all three prongs of the test are satisfied, the court determines whether to address the error to ensure fairness and integrity in judicial proceedings. *Id.* This approach by Minnesota would be the approach sought by the Smiths on appeal.

For example, in *U.S. v. Teffera*, 985 F.2d 1082, 1089 n.6 (D.C. Cir. 1993), the prosecutor made improper references during closing argument to alleged eye contact between co-defendants at the time of arrest. The comment was found to be reversible error as not supported by the evidence. Yet in *U.S. v. Martinez-Medina*, 279 F.3d 105, 118-19 (1st Cir. 2002), the prosecutor's appeals to the jurors' "hearts and minds" and "conscience" were found to be improper appeals to the jurys' emotions and role as conscience of the community yet not reversible. Nonetheless, the

Martinez-Medina court acknowledged the importance of the issue/problem of prosecutorial misconduct:

> The problem of prosecutorial misconduct in closing arguments is by no means confined to the District of Puerto Rico. Cf. Bennett L. Gershman, *Prosecutorial Misconduct* §11:1, at 11-3 (2d ed. 2001) (noting that such misconduct has "become staple in American prosecutions" and "shows no sign of abating or being checked by institutional or other sanctions").
>
> . . .
>
> Prosecutorial misconduct erodes our confidence in the very government entities charged with protecting the public's interests through enforcement of our laws. Moreover, by presenting this Court time and again with convictions tarnished by misconduct, prosecutors breed further cynicism by asking us to affirm these convictions on harmless-error grounds. The overall effect is one that impugns the dignity of both the executive and the judiciary. Its pernicious results are a cause of concern for all of us.

Id. at 130-131.

There are many cases found to be reversible yet not as dramatic as the present case. For example in *U.S. v. Payne*, 2 F.3d 706 (6th Cir. 1993), similar to the present case, the prosecutor undertook calculated efforts to "evoke strong sympathetic emotions" for victims and against defendants by making repeated

references to Christmas time, the poor, pregnant women, and major employee layoffs. The *Payne* Court reversed the conviction.

Another case involving a flagrant appeal to passion and prejudice is *State of South Carolina v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007). The Supreme Court of South Carolina held, *inter alia*, the State's improper comments and action during closing argument of the sentencing phase constituted reversible error. The *Northcutt* Court found that the State had infected the jury's deliberations with passion and prejudice so as to require reversal. The solicitor concluded his argument in a child murder case by producing a large black shroud and draping it over the baby's crib and then staged a funeral procession for the jury. Trial counsel had not objected at trial. This staged funeral is very similar to the present case, yet the Georgia Supreme Court refused to reverse while the South Carolina Supreme Court did.

In *State v. Lockhart*, 24 Kan. App. 2d 488, 947 P.2d 461 (1997), the prosecuting attorney called the defendant and defense counsel liars and the defendant a drug dealer in an attempt to appeal to the jury's passions. The court in reversing and remanding for a new trial stated that "[j]uries must be given an opportunity to exercise reason and sound judgment in deciding the facts of a case, free from passion and prejudice." *Lockhart*, 24 Kan. App. 2d at 492, 947 P.2d 463. The court noted that it could not conclude beyond a reasonable doubt that the prosecutor's statements had no effect on the jury's decision. How does

this name-calling warrant reversal but a full drama reminding the jury of lost birthdays in the innocence-guilt phase get overlooked? There is a need for clarity on this issue.

This Court needs to review the issue and give substance and meaning to the *Berger* admonition to prosecutors that they may "strike hard blows, [they are] not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). Prosecutors must "refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.* Courts have an obligation to ensure a fair trial. Where the behavior is so inappropriate as in the present case and a prosecutor intentionally injects emotion into jury deliberation, courts must intervene and there should be consequences to preserve the concept of a fair trial based on facts rather than showmanship. The United States Supreme Court's leadership on this issue is needed.

2. The issue of prosecutorial misconduct is a regularly occurring issue in criminal trials across the country and thus the Court can address an issue of national importance.

This Court has considered overreaching by prosecutors in numerous cases, and although not specifically and directly addressing the issues of the present case, the United States Supreme Court has decided cases whose spirit conflicts with the Georgia

Supreme Court's holding in this case. See generally, *U.S. v. Young*, 470 U.S. 1 (1985); *Lawn v. United States*, 375 U.S. 339 (1958); *Sacher v. United States*, 343 U.S. 1 (1952); *Vierick v. United States*, 318 U.S. 236 (1943); and *Berger v. United States*, 295 U.S. 78 (1935).

The Court stated in *Young*, which clearly was not followed by the trial court nor considered by the Georgia Supreme Court, the following:

> [T]he courts must not lose sight of the reality that "[a] criminal trial does not unfold like a play with actors following a script." *Geders v. United States,* 425 U.S. 80, 86 (1976). It should come as no surprise that, "in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused." *Dunlop v. United States,* 165 U.S. 486, 498 (1897).
>
> We emphasize that the trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; "the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." *Quercia v. United States,* 289 U.S. 466, 469 (1933). The judge "must meet situations as they arise and [be able] to cope with . . . the contingencies inherent in the adversary process." *Geders v. United States, supra,* at 425 U.S. 86. Of course, "hard blows" cannot be avoided in criminal trials; both the prosecutor and

> defense counsel must be kept within appropriate bounds. *See Herring v. New York,* 422 U.S. 853, 862 (1975).

U.S. v. Young, at 10-11 (footnotes omitted).

The misconduct in the present case is distinguishable from *Young* in a significant way. The misconduct in the present case was not made in the heat of argument but was coldly calculated when the cake and candles were purchased as a prop for the scripted appeal to jury sympathy.

During the World War II era, as shown by *Vierick, supra*, appeals to emotions by prosecutors can be found. In *Vierick*, the Court reversed a conviction where the prosecuting attorney in his closing remarks to the jury, "indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice." *Vierick*, 318 U.S. at 247. Contrary to the view of the Georgia Supreme Court in the present case, the *Vierick* Court stated "that the trial judge should have stopped counsel's discourse without waiting for an objection." *Vierick*, 318 U.S. at 248.

Also indicative of the pervasive nature of the issue of prosecutorial misconduct in closing argument is the academic research urging a solution. *See generally*, Sullivan, *Prosecutorial Misconduct in Closing Argument in Arkansas Criminal Trials*, 20 U. Ark. Little Rock L. Rev. 213 (1998); Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37

Seton Hall L. Rev. 335 (2007); DeFour, *Prosecutorial Misconduct in Closing Argument*, 7 Nova L. Rev. 443 (1983); Clifford, *Identifying and Preventing Improper Prosecutorial Comment in Closing Argument*, 51 Me. L. Rev. 241 (1999); and Cantrell, *Prosecutorial Misconduct: Recognizing Errors in Closing Argument*, 26 Am. J. Trial Advoc. 535 (2003). This issue is recurring and much discussed and now the limits of misconduct have been reached so as to call on this Court to provide guidance.

The extensive caselaw and research make clear that the problem of prosecutorial misconduct in closing argument remains unchecked. The present case shows that prosecutors are pushing the envelope for the stunts they will perform in court. Without a judicial check, the prosecutor is unrestrained and cannot balance easily zealous advocacy with the duty to seek justice.

3. This case affords the ideal opportunity to address whether defense counsel's failure to object in the face of obvious, ongoing prosecutorial misconduct can be justified by merely claiming "strategy" or "tactics."

Sonya Smith's counsel claims to have made a strategic decision not to object to the "Happy Birthday" song during the State's closing argument. Specifically, he preferred to remain silent during the argument rather than run the risk of offending

anyone on the jury by giving the impression that he was simply trying to disrupt the prosecutor's argument. (App. at 11).

Sonya Smith's counsel essentially uttered the magic words that he had strategic justification for not objecting to what the Georgia Supreme Court found to be inappropriate closing argument. If trial counsel need only claim he did not want to offend the jury as a basis for not objecting, then there is no ineffective assistance of counsel for failure to object because trial counsel can always make that claim. Ironically, Sonya Smith's counsel did not want to offend the jury while Joseph Smith's counsel was hoping the jury would be offended.

"Arora testified at the motion for new trial hearing that he made a strategic decision not to object to the 'Happy Birthday' song during closing argument. Specifically, Arora thought that the 'Happy Brithday (sic)' song was so 'preposterous,' 'absurd,' and 'over the top' that 'it would turn the jurors off,' and that he should not call any more attention to it by objecting to it." (App. at 15).

The contradictory position by co-counsel in the same case regarding failure to object is indicative of how ineffective assistance claims can be denied by the mere utterance of some purported strategic purpose. The ruling by the Georgia Supreme Court states that counsel can justify failure to object by hoping that the misconduct might backfire on the prosecutor. However, as the dissent critiqued the majority opinion:

> A reasonable attorney does not stand by silently and allow the prosecutor to figuratively toss the victim into the jury box, with the resulting prejudice to counsel's clients, out of concern that an objection essential to protecting the impartiality of the jury might "give the impression" that he was "disruptive." No reasonable attorney would sacrifice a client's fundamental right to a fair trial for such a ridiculous reason. Nor was counsel's concern legally sustainable here where the trial court in its opening charge expressly instructed the jurors that "you should not be prejudice[d] in any way against a lawyer who makes objections for the party he or she represents."

(App. at 23).

"Reversal of convictions for ineffective assistance of counsel requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The present case offers this Court the opportunity to clarify *Strickland*'s admonition that "scrutiny of counsel's performance must be highly deferential." The Court has never fully addressed the limitations of strategy/tactics with regard to an IAC claim. While *Strickland* announced that "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged

conduct, and to evaluate the conduct from counsel's perspective at the time" and further stated that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," this Court has never specifically addressed the issue directly with regard to whether a mere claim of some strategic purpose can completely negate an IAC claim.

The glaring harm of allowing a staged appeal to sympathy to distract the jury from its duty suggests the trial court should have stopped it *sua sponte*, but the Defendants should have been able to count on zealous representation to stop the misconduct, but counsel was missing in action hoping that the jury would recognize the wrongfulness on its own accord rather than having it pointed out by defense counsel. Uttering the magic words of "strategy" does not automatically make trial counsel's omission a reasonable approach to representation. Allowing the Georgia Supreme Court's decision to stand without this Court's review is to permit an illogical attack on the dignity of the criminal justice system and on specific justice for Joseph and Sonya Smith.

CONCLUSION

For the foregoing reasons, Joseph Smith and Sonya Smith respectfully request the Court to grant their petition for certiorari before judgment.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: November 8, 2010

S10A1281. SMITH v. THE STATE.
S10A1282. SMITH v. THE STATE.

MELTON, Justice.

Following a jury trial in these consolidated cases, Sonya and Joseph Smith were found guilty of felony murder, involuntary manslaughter, cruelty to children, aggravated assault, false imprisonment, and reckless conduct based on the couple's treatment of their eight-year-old son, Josef, which led to the child's death.[1] In Case No. S10A1281, Sonya Smith claims,

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[1] On June 15, 2006, the Smiths were indicted for malice murder, three counts of felony murder (with cruelty to children, aggravated assault, and false imprisonment as the underlying felonies), five counts of first degree cruelty to children, three counts of aggravated assault, and two counts of false imprisonment. Following a February 5-14, 2007 jury trial, both of the defendants were found guilty of involuntary manslaughter (as a lesser included offense of malice murder), one count of felony murder (cruelty to children), four counts of cruelty to children, all three counts of aggravated assault, one count of false imprisonment, and reckless conduct (as a lesser included offense of the remaining false imprisonment count). On March 27, 2007, the trial court sentenced the Smiths to life imprisonment for felony murder; twenty consecutive years for cruelty to children (striking Josef with a glue stick); ten years for cruelty to children (confining Josef to a small room) and false imprisonment (confining Josef to a small room), with these sentences to run concurrent with each other and consecutive to the felony murder and cruelty to children (striking with a glue stick) counts; and twelve months for reckless conduct, to run concurrent with the felony murder and cruelty to children (striking with a glue stick)

(Continued on following page)

among other things, that the trial court erred in allowing the prosecutor to make an improper closing argument, and that her trial counsel was ineffective. In Case No. S10A1282, Joseph Smith claims that the evidence was insufficient to sustain his convictions; that his trial counsel was ineffective; and that the trial court erred by failing to merge his conviction for felony murder into his involuntary manslaughter conviction. For the reasons that follow, we affirm in both cases. Viewed in the light most favorable to the jury's verdict, the record reveals that Joseph and Sonya Smith routinely disciplined their son, Josef, by beating him with glue sticks, belts, and heated coat hangers; locking him in confined spaces for extended periods of time; and tying his hands with rope. During the day on October 8, 2003, Joseph disciplined Josef several times, striking him repeatedly with a foot long glue stick. At one point, Josef began complaining of severe stomach pains and had urine that was brownish in color. Later, while Joseph was taking

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counts. The involuntary manslaughter, cruelty to children (striking Joseph in the head and confining him in a box), and aggravated assault (using unknown object to strike Joseph in the head) counts were merged into the felony murder count for sentencing purposes; and the remaining aggravated assault charges (striking with a glue stick and unknown objects) and cruelty to children charge (striking with unknown objects) were merged into the cruelty to children charge upon which the Smiths were sentenced (striking with a glue stick) for sentencing purposes. The Smiths' timely appeals were docketed in this Court for the April 2010 Term, and their cases were orally argued on July 6, 2010.

a shower, Sonya Smith beat Josef with a glue stick, drawing blood through Josef's clothing. Sonya and the Smiths' eldest son, Mykel Booth, then forced Josef into a wooden box, beating him about the head as they did so. Sonya and Mykel then tied the box shut with a cord. When Joseph later came out of the shower and removed Josef from the box, the child was barely breathing. Emergency services personnel were called to the Smiths' residence with an unresponsive child complaint, and Josef was taken to the hospital, where he later died. Numerous medical experts examined the extensive bruising throughout Josef's body and to Josef's head, and testified that the cause of Josef's death was either blunt force trauma or asphyxiation.

Case No. S10A1281

1. The evidence outlined above was sufficient to enable a rational trier of fact to find Sonya Smith guilty of all the crimes for which she was convicted. *Jackson v. Virginia*, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. Sonya contends that the trial court erred in allowing the prosecutor to dim the lights in the courtroom, bring out a cake with lit candles, and sing "Happy Birthday" to the deceased victim during her closing argument. However, Sonya failed to object to this argument by the prosecutor, and has therefore waived review of this issue on appeal. *Mullins v. State*, 270 Ga. 450, 451(2) (511 SE2d 165) (1999) (in

case where death penalty is not imposed, "it [is] incumbent upon [the defendant] to raise an objection to the State's argument below in order to preserve the right to contest the propriety thereof in a subsequent appeal"). See also *Paul v. State*, 272 Ga. 845, 848(3) (537 SE2d 58) (2000) ("Plain error" rule applies only "to death penalty cases, and other criminal cases in which the trial court violates OCGA § 17-8-57 [judge expressing or intimating opinion as to what has or has not been proved or as to the guilt of the accused]").

3. Sonya argues that the trial court erred in denying her motion for a mistrial after her son, Mykel, testified that the Smiths prayed that they had not "los[t] another son" after they pulled an unresponsive Josef from the box in which he had been placed. Instead of granting a mistrial, the trial court gave a comprehensive curative instruction, informing the jury that they had to disregard the testimony and could not consider it "in any way, in any form, [or] in any fashion."

"When a prejudicial matter is improperly placed before the jury, a mistrial is appropriate if it is essential to the preservation of the defendant's right to a fair trial." (Citation omitted.) *White v. State*, 268 Ga. 28, 32(4) (486 SE2d 338) (1997). It is within the discretion of the trial court to decide "whether a mistrial must be granted as the only corrective measure or whether the prejudicial effect can be corrected by withdrawing the testimony from the consideration of the jury under proper instructions." *Stanley v.*

State, 250 Ga. 3, 4(2) (295 SE2d 315) (1982). Here, the curative instruction given by the trial court adequately preserved Sonya's right to a fair trial. Accordingly, the trial court did not abuse its discretion in denying Sonya's motion for a mistrial. See *Johns v. State*, 274 Ga. 23, 25(3) (549 SE2d 68) (200 1) (this Court "must presume that the jury followed [its] instruction and disregarded the [witness'] statement") (citations omitted).

4. Sonya contends that the trial court erred by denying her motion for a new trial because the jury's verdict finding her guilty of involuntary manslaughter as a lesser included offense of malice murder was "mutually exclusive" from the jury's verdict finding her guilty of felony murder.

> "Verdicts are mutually exclusive where a guilty verdict on one count logically excludes a finding of guilt on the other.'" [Cits.] Thus, the rule against mutually exclusive verdicts applies to multiple guilty verdicts which cannot be logically reconciled; the rule is not implicated where . . . verdicts of guilty and not guilty are returned. [Cit.]

Shepherd v. State, 280 Ga. 245, 248(1) (626 SE2d 96) (2006).

Here, the evidence authorized the jury to logically conclude that Sonya had committed several acts of abuse against her son, some of which may have been non-felony acts of abuse that inadvertently led to or contributed to her son's death (see OCGA § 16-5-3),

and others that may have constituted felony cruelty to children, which would have served as the underlying basis for the felony murder conviction. See OCGA § 16-5-70(b) ("Any person commits the offense of cruelty to children in the first degree when such person maliciously causes a child under the age of 18 cruel or excessive physical or mental pain"). The verdicts here were not mutually exclusive, and this enumeration lacks merit.

5. Sonya claims that the trial court erred by failing to properly advise her regarding her right to testify when her counsel announced that Sonya would not be testifying on her own behalf. However, in order to ensure that Sonya was making an informed decision about whether or not to testify, the trial court did thoroughly discuss with Sonya the pros and cons of her testifying on her own behalf after her counsel announced that she would not be testifying. Moreover, after the trial court engaged in this extensive discussion and asked Sonya's counsel whether anything had been left out of the discussion regarding Sonya's right to testify, Sonya's counsel replied, "I don't think you left anything out."[2] To the extent that Sonya now claims that the trial court should have said something more or something different, she has waived review of this issue by failing to object to the information that the trial court did in fact give to her.

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[2] We also note that there is no allegation that Sonya's own trial counsel did not properly advise her regarding her right to testify.

See, e.g., *Bridges v. State*, 279 Ga. 351(9) (613 SE2d 621) (2005).

6. Sonya argues that the trial court erred by overruling Joseph Smith's counsel's objection to the prosecutor asking a State's witness to rate the injuries suffered by the deceased in comparison to other cases that the witness had seen. However, because Sonya did not join in Joseph's objection at trial, or lodge an objection of her own, this issue is also waived on appeal. See *Ashford v. State*, 271 Ga. 148(2) (518 SE2d 420) (1999).

7. Sonya urges that the trial court erred in refusing to admit into evidence at the motion for new trial hearing a Court TV video recording of the prosecutor's closing argument. However, to the extent that Sonya wished to use the video to supplement the official trial transcript and shed additional light on the trial proceedings, she failed to follow the proper procedures to make the video part of the official court record. See OCGA § 5-6-41(f) ("Where any party contends that the transcript or record does not truly or fully disclose what transpired in the trial court and the parties are unable to agree thereon, the trial court shall set the matter down for a hearing with notice to both parties and resolve the difference so as to make the record conform to the truth"). Accordingly, we find no abuse of discretion in the trial court's decision to exclude the videotape.

8. Sonya claims that her trial counsel was ineffective because (a) counsel failed to have voir dire

recorded, (b) counsel failed to object to the prosecutor asking a witness to compare the victim's injuries in this case to others that he had seen, (c) counsel failed to object to Joseph Smith's counsel asking a State's witness about the severity of the victim's injuries, (d) counsel failed to object to references at trial to a court ruling regarding the custody of the Smiths' remaining children, (e) counsel failed to make a record of his agreement with the prosecutor stating that evidence of the Smith's other deceased child would not be admitted at trial, (f) counsel failed to effectively cross-examine several State's witnesses, (g) counsel failed to make a closing argument, (h) counsel failed to object to the prosecutor's "Happy Birthday" song during closing argument, (i) counsel failed to present good character evidence at trial, and (j) counsel failed in his overall performance at trial, as evidenced by the cumulative effects of errors (a)-(i) outlined above.

In order to succeed on her claim of ineffective assistance, Sonya must prove both that her trial counsel's performance was deficient and that there is a reasonable probability that the trial result would have been different if not for the deficient performance. *Strickland v. Washington,* 466 U.S. 668 (104 S. Ct. 2052, 80 LE2d 674) (1984). If an appellant fails to meet his or her burden of proving either prong of the Strickland test, the reviewing court does not have to examine the other prong. Id. at 697(IV); *Fuller v. State,* 277 Ga. 505(3) (591 SE2d 782) (2004). In reviewing the trial court's decision, "'[w]e accept the

trial court's factual findings and credibility determinations unless clearly erroneous, but we independently apply the legal principles to the facts.' [Cit.]" *Robinson v. State*, 277 Ga. 75, 76 (586 SE2d 313) (2003).

(a) Contrary to Sonya's contentions, the failure to have voir dire recorded, by itself, does not amount to ineffective assistance. *Williams v. State*, 277 Ga. 853(6)(e) (596 SE2d 597) (2004).

(b); (c) Sonya has failed to show how her counsel's failure to object to testimony about the severity of the victim's injuries would have a created a reasonable likelihood of a different result at trial. Indeed, there was overwhelming evidence of the extreme nature of the victim's injuries that resulted from beatings by Sonya, and counsel's failure to object to the testimony relating to the extent of the victim's injuries does not indicate that the outcome at trial would have been different if counsel had objected. See, e.g., *Johnson v.* State, 281 Ga. 770(2)(b) (642 SE2d 827) (2007).

(d) Sonya did not question her trial counsel about his failure to object to the testimony regarding the custody of the Smiths' other children. Accordingly, "there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[,] [and] [w]here[, as here,] trial counsel does not testify at the motion for new trial hearing about the subject, it is extremely difficult to overcome this presumption." (Citation and punctuation

omitted.) *Higginbotham v. State,* 287 Ga. 187, 190-191(5)(a) (695 SE2d 210) (2010). We find that evidence supports the conclusion that Sonya failed to overcome the strong presumption that her counsel rendered effective assistance here. Counsel's choice not to object "may have been a strategic decision, and because [Sonya] did not question trial counsel concerning this decision, [Sonya] has failed to carry [her] burden to demonstrate that trial counsel provided deficient performance." (Footnote omitted.) *Dyer v. State,* 278 Ga. 656, 660(7) (604 SE2d 756) (2004).

(e) As explained in Division 3, supra, the trial court gave a proper curative instruction in response to Mykel's testimony that the Smiths had lost another child. Accordingly, whether or not trial counsel made a sufficient record of his agreement with the prosecutor that no such testimony would be admitted at trial makes no difference. Pretermitting the question whether the failure to make a record of the agreement with the prosecutor would constitute deficient performance, there is no reasonable probability that the outcome of the trial was affected by the alleged failure to make such a record. See, e.g., *Rivers v. State,* 283 Ga. 1(3)(a) (655 SE2d 594) (2008).

(f) "Like the determination of which witnesses to call, the extent of cross-examination is a strategic and tactical decision within the exclusive province of the attorney after consultation with the client." (Citation omitted.) *Fairclough v. State,* 276 Ga. 602, 605(4) (581 SE2d 3) (2003). Here, counsel testified at the motion for new trial hearing that he conferred

with Joseph Smith's counsel regarding cross-examination, and that he chose not to cross-examine certain witnesses whenever he was satisfied that Joseph's counsel had elicited the same information on cross-examination that he, himself, would have elicited. In light of this reasonable strategic choice, we find that evidence supports the trial court's conclusion that counsel rendered effective assistance. See, e.g., *Smith v. State,* 283 Ga. 237(2)(b) (657 SE2d 523) (2008).

(g) Counsel made a strategic decision not to make a closing argument. In counsel's professional judgement, one, cohesive closing argument delivered by counsel for Joseph Smith would be more effective than presenting two closing arguments. "Inasmuch as th[is] decision . . . was not patently unreasonable, and because [Sonya] provides no basis for concluding that the result of [her] trial would have been different if [her counsel] had [presented an additional] closing argument, [she] has not shown that [her] trial counsel was ineffective in this regard." (Citation omitted.) *McKenzie v. State,* 284 Ga. 342, 347(4)(b) (667 SE2d 43) (2008).

(h) Counsel made a strategic decision not to object to the "Happy Birthday" song during the State's closing argument. Specifically, he preferred to remain silent during the argument rather than run the risk of offending anyone on the jury by giving the impression that he was simply trying to disrupt the prosecutor's argument. See *Braithwaite v. State,* 275 Ga. 884, 886(2)(b) (572 SE2d 612) (2002) (where

attorney "reasonably cho[oses] silence [instead of objecting to improper closing argument], . . . we will not use hindsight to second-guess that decision on appeal"). As explained more fully in Division 10(b), infra, while this Court frowns upon the prosecutor's antics and finds them to be highly inappropriate, counsel's decision to remain silent was reasonable, considering the fact that the prosecutor's argument was so "preposterous" and "over the top" that it may have worked to the benefit of the defense even absent an objection. Indeed, it cannot be said that the jury may not have been alienated by the prosecutor's theatrical stunt during its closing argument, as the jury found Sonya not guilty on several of the charges against her, including two charges of felony murder, one of the first degree cruelty to children charges, and the malice murder charge.

(i) "Whether to introduce character evidence and potentially open the door for impeachment is clearly one of tactics and strategy." (Citation omitted.) *Washington v. State,* 276 Ga. 655, 659(3)(c) (581 SE2d 518) (2003). After discussing the issue with Sonya, counsel made a reasonable strategic decision not to introduce good character evidence, as he did not wish to open the door to potentially damaging questions on cross-examination regarding whether the opinions of the good character witnesses would have changed if they knew that someone had caused the death of a child. This claim of ineffective assistance is without merit. Id.

(j) "Because [Sonya] has not shown ineffective assistance of [her] trial counsel in any area of [her] trial, [her] claim that trial counsel's individual and cumulative errors deprived [her] of a fair trial is without merit." *Franks v. State,* 278 Ga. 246, 264(2)(B)(9) (599 SE2d 134) (2004).

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9. The evidence outlined above was sufficient to enable a rational trier of fact to find Joseph Smith guilty of all the crimes for which he was convicted. *Jackson v. Virginia,* 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979); see also OCGA § 16-2-20 (parties to a crime). Indeed, regardless of whether the jury believed Mykel Booth's testimony that Joseph was in the shower at the time that Mykel and Sonya beat Josef and placed him in a wooden box, the evidence authorized the jury to conclude that Josef was already in distress from beatings that he had received from Joseph earlier in the day, and that, even if these beatings "did not directly cause the victim's death, the beating[s] either materially contributed to the death or materially accelerated it." *Lawson v. State,* 274 Ga. 866, 867(1) (561 SE2d 72) (2002). Moreover, Joseph admitted to police that confining Josef to enclosed spaces was a routine part of the family's discipline, which authorized the jury to conclude that Joseph was in fact directly involved in Josef's confinement to the box, or that he encouraged the use of the box that may have contributed to the child's death.

10. Joseph contends that trial counsel was ineffective because (a) trial counsel was acting under a conflict of interest, and (b) counsel failed to object to the prosecutor singing "Happy Birthday" during her closing argument. Both contentions are without merit.

(a) Joseph argues that trial counsel, Manny Arora, was acting under a conflict of interest because he represented both Sonya and Joseph, who had competing interests at trial; and because Arora's legal fees were being paid by a church to which Sonya and Joseph belonged. However, the record belies these claims. While Arora and the attorney who represented Sonya decided together to conduct a joint defense because neither Sonya nor Joseph wanted to blame the other for the victim's death, the fact remains that both Joseph and Sonya had their own, independent, attorneys. See *Whatley v. Terry*, 284 Ga. 555, 563(IV) (668 SE2d 651) (2008) (where attorney did not jointly represent co-defendants, prejudice could not be presumed under specialized ineffective assistance Sixth Amendment conflict of interest case law where defendant could not show that "an actual conflict of interest adversely affected his trial counsel's performance"). Moreover, there is no evidence that the church that paid Arora's legal fees exercised any influence over Arora's independent judgment in representing Joseph. Because evidence supported the trial court's conclusion that Arora provided effective assistance in this regard, that conclusion will not be disturbed here. See id. at 563-564(IV).

(b) Arora testified at the motion for new trial hearing that he made a strategic decision not to object to the "Happy Birthday" song during closing argument. Specifically, Arora thought that the "Happy Brithday" song was so "preposterous," "absurd," and "over the top" that "it would turn the jurors off," and that he should not call any more attention to it by objecting to it. In this regard, we must remind all prosecutors in this State that it is not their job to pursue stunts and antics during their closing arguments that are designed merely to appeal to the prejudices of jurors, but

> to see that justice is done and nothing more. That duty should not be forgotten in an excess of zeal or the eager quest for victory in [any given] case. The people of the state desire merely to ascertain beyond a reasonable doubt that the accused is guilty of the crime charged, and do not countenance any unfairness upon the part of their representatives in court.

(Citations and punctuation omitted.) *Carr v. State*, 267 Ga. 701, 712(10) (482 SE2d 314) (1997). Indeed, in order to ensure that the prosecutor did not let her "excess[ive] . . . zeal or the eager quest for victory in [this] case" lead her to forget her duty "to see that justice is done and nothing more" (id.), the trial court would have been well within its right to control the courtroom by putting an end to the display of the prosecutor, even absent an objection from defense counsel. See OCGA § 15-1-3(4) ("Every court has

power . . . [t]o control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto").

In any event, because it was reasonable for Arora to pursue a strategy that would allow the potentially inappropriate antics of the prosecutor to backfire against her, we find no merit to Joseph's claim that Arora provided ineffective assistance in this regard. See *Braithwaite*, supra, 275 Ga. at 885(2)(b). In this connection, it cannot be said that Arora was incorrect in his belief that the jurors may have been turned off by the closing argument, as the jury found Joseph not guilty on several of the charges against him, including two of the felony murder charges, one of the first degree cruelty to children charges, and the malice murder charge.

11. Joseph urges that the trial court erred by failing to merge his conviction for felony murder into his voluntary manslaughter conviction for sentencing purposes because the verdicts on those counts were mutually exclusive. However, for the same reasons stated in Division 4, supra, relating to Sonya Smith, the verdicts relating to Joseph Smith also were not mutually exclusive. Indeed, the evidence authorized the jury to conclude that some of the acts taken by Joseph were non-felony acts of abuse that stemmed from criminal negligence, whereas others amounted to felony cruelty to children. This contention is without merit.

Judgments affirmed. All the Justices concur, except Hunstein, C.J., and Benham, J., who dissent.

S10A1281. SMITH v. THE STATE.
S10A1282. SMITH v. THE STATE.

HUNSTEIN, Chief Justice, dissenting.

I write because I disagree with the majority that, absent objection, this Court can not review an error affecting the fairness, integrity and public reputation of judicial proceedings caused by a trial court's violation of his duty to maintain order and decorum in his courtroom. Even without application of the plain error rule here, I disagree with the majority that defense counsel's failure to object was based on reasonable strategy and that no prejudice has been shown as a result of the assistant district attorney's theatrical stunt. For these and other reasons set forth below, I respectfully dissent.

1. The majority, while stating that the trial court "would have been well within its *right* to control the courtroom by putting an end to the outrageous display of the prosecutor, *even absent an objection from defense counsel*, [cit.]" (emphasis supplied) Maj. Op., p. 17, refuses to address any error from the trial court's failure to act, although that error was directly raised on appeal. See id. at p. 4 (trial court's error in not stopping prosecutor's birthday cake stunt waived for failure to object). What the majority fails to recognize, however, is that trial judges have not only the

right to control their courtrooms: they have the *duty* to do so. *R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 581(9) (292 SE2d 815) (1982) (setting forth the "*obligation* of the trial court to maintain dignity and decorum in the courtroom" (emphasis supplied)). See also Canon 3(B)(3) of the Code of Judicial Conduct ("[j]udges shall require order and decorum in proceedings over which they preside)." In response to actions taken by the prosecutor that were so "outrageous" that the fairness, integrity and public reputation of this criminal proceeding clearly was adversely affected, I would hold under the exceptional circumstances present in this case that the absence of objection does not prevent this Court from reviewing the error caused by the trial court's breach of its duty to maintain decorum in the courtroom.

Paul v. State, 272 Ga. 845(3) (537 SE2d 58) (2000) completely supports, if not demands, that we review this error even without objection by counsel at the trial court level. Although the majority cites *Paul* for the proposition that our review of plain error is limited to death penalty cases and the violation of OCGA § 17-8-57, this misreads what we held in *Paul*, in which we applied and quoted with approval the Court of Appeals' opinion in *Almond v. State*, 180 Ga. App. 475, 480 (349 SE2d 482) (1986). In the portion of the *Almond* opinion on motion for rehearing, the Court of Appeals held:

> The United States Supreme Court has stated the general rule many times: '"In exceptional circumstances, especially in criminal

> cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson,* 297 U.S. 157, 160.' *Silber v. United States,* 370 U.S. 717, 718 (82 SC 1287, 8 LE2d 798); accord [cits.]

Id. at 480. Finding "the facts of the case at the bar to be exceptional and to seriously affect the fairness, integrity, and public reputation of these judicial proceedings," id., the Court of Appeals addressed the error asserted on appeal even though no objection had been made in the trial court. See also *Putnam v. State,* 231 Ga. App. 190(3) (498 SE2d 340) (1998) (same); *Kearney v. State,* 184 Ga. App. 64, 66 (360 SE2d 633) (1987) (same). Of particular importance is the fact that *Almond* involved neither death penalty issues or any violation of OCGA § 17-8-57. It is thus inappropriate to interpret *Paul* as limiting plain error to those situations. Rather, *Paul* must be read as this Court's decision to adopt the plain error rule of *Silber* and *Atkinson,* supra, when we concluded that "the plain error rule should be applied to cases of [the] kind" addressed in *Almond* and then applied it to hold that the trial court's error so "'seriously affected the fairness, integrity, and public reputation of these judicial proceedings,'" quoting *Almond,* in order to hold that trial counsel's failure to object did not preclude review of the issue on appeal. *Paul v. State,* supra at 848-849(3). Accord *Wright v. State,* 274 Ga.

730(3) (559 SE2d 437) (2002) (declining to review under the plain error rule the admission of certain hearsay statements not objected to at trial because defendant failed to demonstrate how the statements' admission seriously affected the fairness, integrity and public reputation of the trial).

The record in this case establishes[1] that the prosecutor, in the final moments of her concluding argument on behalf of the State, "clicked" her fingers at which signal one of the deputies in the courtroom turned out the lights[2] and an associate prosecutor "popped out a cake out of a grocery bag" complete with eight candles, which were then lit with a lighter brought into the courtroom; the prosecutor and her associate then proceeded to sing to "dear Josef," i.e., the deceased victim, the celebratory words to "Happy Birthday."

There was no legitimate reason for what the prosecutor did. It was neither argument nor rebuttal, because there is nothing at all in the record about birthdays and birthday cakes to raise even the

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[1] I do not address the majority's resolution of the trial court's exclusion of the Court TV DVD because I find that the testimony of the witnesses at the hearing on appellants' motion for new trial is adequate for the Court's consideration of this point of error. See *Wright v. Texas*, 178 SW3d 905, 917 (Tex. App. 2005).

[2] Although case law reflects that other prosecutors have dimmed the courtroom lights in closing argument, see *Davis v. State*, 285 Ga. 343(2) (676 SE2d 215) (2009), they did so to highlight evidence properly admitted in the case.

slightest possibility that the prosecutor was drawing a reasonable inference from the evidence presented or the arguments made by defense counsel. To the contrary, the evidence established that the victim's family followed an austere lifestyle, including dietary restrictions, that eliminated the possibility of the victim experiencing the type of birthday event dramatized by the prosecutor.[3] The prosecutor's birthday production was not meant to be argument or rebuttal: it was a theatrical stunt spun out of pure fantasy. Its sole purpose was to prejudice the rights of appellants before the jury in an impermissible attempt to invoke the jury's passions and divert the jury from the evidence.[4] It offended the dignity and decorum of the

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[3] Although it seriously concerns me, I do not address the possibility that, by introducing the birthday cake, the prosecutor was deliberately provoking an intolerant attitude in the jury toward the religious beliefs practiced by appellants, particularly in regard to their strict nutritional eating habits. But I question the legal consequences had this birthday stunt been used in a case involving defendants who, e.g., were members of Jehovah's Witness, a religious denomination with beliefs against observing birthdays. See generally Roy, The Establishment Clause and the Concept of Inclusion, Ore. L. Rev. 1, 39 (2004); *Waites v. Waites*, 567 SW2d 326 (Mo. 1978).

[4] I am giving the prosecutor the benefit of the doubt by concluding that her motive for pulling this stunt was simply to evoke sympathy for the victim in an unprofessional attempt to obtain guilty verdicts at any cost, as this motive is less offensive than the other possible motive raised by this case, i.e., that she was deliberately pandering to the television audience observing the proceedings on Court TV. See defense counsel's testimony at the hearing on appellants' motion for new trial ("I understand

(Continued on following page)

court and violated every precept of professionalism and fair play. Yet the trial court did absolutely nothing. The event played itself out without the trial judge performing his duty to maintain decorum in the courtroom. Moreover, after observing this "'preposterous'" performance, the trial court took no steps of any kind to minimize the prejudice. There was no rebuke to counsel; there was no direction to the jury to ignore the spectacle they had just witnessed; there was no charge to the jury that sympathy for the victim was to play no role in their verdict. See Div. 1(C), infra.

The record is clear that the trial judge violated his duty to maintain order and decorum in his courtroom. Although he told the jurors in his pre-trial instructions that he was "going to make sure that the decorum of the court – that the decorum of the courtroom stays intact," he took no action to stop an out-of-control prosecutor from turning his courtroom into a theater stage for her unprofessional behavior, which could only have left the jury with the impression that what she did was perfectly acceptable. It is beyond question in this exceptional circumstance that the trial judge's failure to maintain the decorum of his courtroom was an error that seriously affected the fairness, integrity and public reputation of these criminal proceedings, such that "the plain error rule

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the cameras were rolling and everybody wants to be Nancy Grace's friend").

should be applied" to this case, *Paul v. State,* supra, 272 Ga. at 848(3), and these convictions reversed.

2. Even treating this issue as arising solely under a claim of ineffective assistance of counsel, I cannot agree with the majority that the defense counsel's failure to object was based on a reasonable strategy and thus did not constitute deficient performance.

First, I disagree with the conclusion drawn by the majority that counsel's decision to remain silent here could qualify as reasonable due to counsel's wish to avoid "run[ning] the risk of offending anyone on the jury." Maj. Op., p. 13. A reasonable attorney does not stand by silently and allow the prosecutor to figuratively toss the victim into the jury box, with the resulting prejudice to counsel's clients, out of concern that an objection essential to protecting the impartiality of the jury might "give the impression" that he was "disruptive." No reasonable attorney would sacrifice a client's fundamental right to a fair trial for such a ridiculous reason. Nor was counsel's concern legally sustainable here where the trial court in its opening charge expressly instructed the jurors that "you should not be prejudice[d] in any way against a lawyer who makes objections for the party he or she represents." See *Smith v. State,* 267 Ga. 372, 374(3) (477 SE2d 827) (1996) ("[q]ualified jurors under oath are presumed to follow the trial court's instructions").

I also disagree with the majority's finding that defense counsel was not ineffective on the basis that

defense counsel pursued a "reasonable" strategy by gambling that the prosecutor's stunt would "backfire" on the prosecution. Maj. Op., pp. 13 and 17. The majority even approves this strategy: "[i]ndeed, it cannot be said that *the jury may not have been alienated* by the prosecutor's theatrical stunt during its closing argument." (Emphasis supplied.) Id. at p.13. The prosecutor's stunt was intended to evoke sympathy for the victim so that the jury, diverted from the facts, would return a verdict based on passion, not the evidence and the law. How is it "reasonable" strategy for defense counsel to use the prosecutor's improper stunt to elicit the opposite but equally improper effect in the jury? It is just as inappropriate for a jury to return a verdict based on prejudice or bias against the State as it is for the jury to return a verdict against the defense based on sympathy for the victim. A jury's verdict must be based on the facts and the law, not passion or prejudice. *Jackson v. State*, 278 Ga. 235(5)(a) (599 SE2d 129) (2004). I cannot agree with the majority's holding that the strategy pursued by defense counsel was reasonable when that strategy is directly contrary to Georgia law. I would instead find that defense counsel performed deficiently by failing to object to the prosecutor's theatrical performance.

3. Turning to the second prong of the *Strickland v. Washington* test, I disagree with the majority that appellants failed to establish prejudice from the birthday cake stunt. First, I disagree with the majority that the jury's verdict can be interpreted in any

manner as demonstrating a lack of prejudice. The Counts 3 and 4 felony murder charges on which the jury found appellants not guilty were predicated on the exact same allegations that served as the bases for the Count 2 felony murder/cruelty to children charge, as to which the jury found appellants guilty. It is notable that the jury chose to return its guilty verdict on the felony murder charge predicated on cruelty to children, i.e., the one felony most likely to be influenced by the State's improper invocation of sympathy for the victim, as also reflected by guilty verdicts to felony cruelty to children charges in Counts 5, 10, and 12.[5] The jury completely exonerated appellants of only one offense, the false imprisonment charge in Count 7 (which reiterated the "wooden box" confinement alleged in the Count 2 felony murder/cruelty to children charge), and found appellants guilty of lesser included offenses only as to the malice murder count and the Count 14 cruelty charge (by delaying medical treatment), which is more a comment on the weakness of the State's evidence to support those charges than the lack of any prejudice resulting from the prosecutor's birthday cake stunt.

Moreover, unlike the situation in *Davis v. State,* 285 Ga. 343(2) (676 SE2d 215) (2009), where the prosecutor dimmed the lights and called for a moment

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[5] Of course, the jury's verdict could also be explained by the reasonable possibility that it concluded, with only *one* victim, that appellants should not be found guilty of more than one murder charge,

of silence while spotlighting photos of the victims admitted into evidence, no instruction was given here by the trial court to "cure" the prejudice. Notwithstanding the prosecutor's behavior, the jury was never charged that "they could only consider the evidence and the law as charged, and that sympathy for the victim . . . should play no role in their verdict. [Cit.]" Id. at 344-345(3).[6]

The prosecutor's behavior can not be considered in the same light as some incidental statement or minor aberration made in the course of her closing argument. It was an unprofessional tactic undertaken for the purpose of ensuring that the State obtain a conviction. It is difficult if not impossible to imagine that the minds of the jurors would not have been influenced by the spectacle they observed. I would find that prejudice to appellants was so highly probable as a result of the prosecutor's unprofessional conduct that the majority is not justified in assuming its non-existence.

4. "From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall [be sentenced to life in prison for murder] must be conducted with dignity and respect." *Wellons v. Hall,* U.S. (130 SC 727, 175 LE2d 6845) (2010) (vacating judgment to reconsider evidentiary effect of gag gift given to judge and bailiff by jurors).

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[6] The transcript reveals that no charge on this issue was given to the jury in the pre-trial instructions.

While that case involved the death penalty, I would apply its standard to this case as well. But the behavior at issue here was no juror-initiated tasteless gag gift. It was an assistant district attorney – an officer of the court and a representative of the State of Georgia – who debased the dignity and respect of these criminal proceedings. Rather than "adher[ing] to the highest standards of professionalism and proper courtroom decorum [cits.]," *Gissendaner v. State,* 272 Ga. 704, 713(10) (532 SE2d 677) (2000), this prosecutor embarrassed every member of our profession with her behavior. The uncontroverted evidence of the events orchestrated by the prosecutor and performed in front of the jury with the tacit permission of the trial court establishes conclusively that the prosecutor did not concern herself with appellants' right to a fair trial. She cared only to win at any cost without regard to how unfair, how undignified, how disrepectful her actions were.

We can not lose sight of the fact that the legitimacy of our criminal justice system is undermined when we allow proceedings to be conducted in such a manner that they are rightfully perceived to be unfair. As critically important as the constitutional rights of criminal defendants are, those rights are not the only matters that must concern us. We do a disservice to victims, witnesses, jurors, the bench and bar, and the people of the State of Georgia in general when we do not uphold the dignity and integrity of our criminal justice proceedings. Prosecutorial misconduct of this nature is never harmless because,

regardless of the particular verdict rendered, the misconduct damages the perception of fairness of trials that is essential to the effectiveness of the system itself. See *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (100 SC 2814, 65 LE2d 973) (1980) (Brennan, J., concurring).

Our courtrooms are not theaters; the participants in a criminal trial are not actors in realty television programs. It is not enough to "frown on" behavior that undermines the very foundation of the criminal proceedings. We have to *stop* it. And the only effective means of stopping it is to punish this behavior in the strongest possible manner. The only thing that gets attention is reversal.[7] See, e.g., *Braithwaite v. State,* 275 Ga. 884 (572 SE2d 612) (2002) (1)(b), which demonstrates the continued use of "golden rule" arguments by prosecutors despite this Court's unequivocal condemnation of their use.

For these reasons I would reverse these convictions based on the State's deliberate behavior that deprived appellants of their fundamental right to a fair trial.[8]

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[7] Even reversal will not work to alter the behavior of certain professionally-challenged prosecutors aiming for a career elsewhere, such as on television.

[8] I address the error committed by the trial court in its charge on involuntary manslaughter because the issue may occur on retrial. The jury was charged that it could find appellants guilty of involuntary manslaughter based on either reckless conduct or battery. As in *Drake v. State,* Ga. (Case No.

(Continued on following page)

I am authorized to state that Justice Benham joins in this dissent.

S10A1207, decided), the verdict form did not enable the jury to specify which misdemeanor served as the basis for the guilty verdict the jury returned on involuntary manslaughter as a lesser included offense of malice murder, creating the potential for conflict when the jury then returned a guilty verdict on felony murder based on cruelty to children. Unlike *Drake*, however, the jury here was *not* properly instructed. In its charge to the jury about criminal intent, the trial court instructed the jury that "intent is an essential element of *any* crime" (emphasis supplied) but the trial court never defined or otherwise instructed the jury on criminal negligence. The jury was instructed that criminal intent "may be inferred from acts and conduct, or it may be . . . inferred when it is the natural and necessary consequence of the act" but received no information from the trial court that would have enabled the jury to understand that persons who commit reckless conduct by "consciously disregarding a substantial and unjustifiable risk [of] caus[ing] harm or endanger[ing] the safety of the other person," as charged, are *not* acting with criminal intent that may be inferred from their acts but were instead acting with criminal negligence. While the trial court in *Drake* expressly alerted the jury to the fact that reckless conduct was not a crime involving criminal intent, the trial court here left the jury utterly clueless. But for the fact that the victim here sustained several injuries, see *Jackson v. State*, 276 Ga. 408, 411(c) (577 SE2d 570) (2003), I would not be able to agree with the majority that no mutually exclusive verdict was returned in this case.

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	*	**CRIMINAL ACTION**
	*	**FILE NO: 06-9-2974-33**
VS.	*	
	*	**(Filed Oct. 9, 2009)**
JOSEPH SMITH	*	
SONJA SMITH	*	

ORDER DENYING NEW TRIAL

Both Joseph Smith and Sonya Smith filed an Amended Motion for New Trial and Briefs in support thereof in the above and foregoing matter. The State filed a Brief in opposition to Defendant's Motion for New Trial.

The Court held a consolidated hearing on these matters on February 5, 2009 and February 20, 2009. The Court heard testimony and argument on these dates. After careful consideration of the entire record, all evidence submitted, and arguments of counsel, this Court makes the following findings of fact and conclusions of law:

1.

Counsel Manubir S. Arora's performance was *not* professionally deficient.

2.

Counsel John Hesmer's performance was *not* professionally deficient.

This Court DENIES the Amended Motion for New Trial on all allegations and specifically rules that attorneys Arora and Hesmer provided effective assistance of counsel.

SO ORDERED this 8th day of October, 2009.

/s/ James G. Bodiford
James G. Bodiford
Judge
Cobb Superior Court
Cobb Judicial Circuit

CERTIFICATE OF SERVICE

This is to certify that I have this date place a copy of the attached order in the United States Mail to the following:

John R. Edwards
Assistant District Attorney
District Attorney's Office

Edwin J. Wilson
1378 Scenic Hwy. North
Snellville, Ga. 30078

Richard O. Allen
Box 330210
Atlantic Beach, Florida 32233

This the 9th day of Oct, 2009.

/s/ Jan Porter
Jan Porter
Judicial Administrative
Assistant
Judge James G. Bodiford
Cobb Superior Court

IN THE SUPERIOR COURT OF COBB COUNTY, GEORGIA

CRIMINAL ACTION NO. 06-9-2974-33
WARRANT NO. 03-W-12071 & 03-W-13192

The State

vs

Sonya Smith

/s/ Jay C. Stephenson
Jay C. Stephenson
Clerk of Superior Court Cobb County

OFFENSE(S) (12) Cruelty to Children – First Degree
(13) False Imprisonment

☐ PLEA ☐ NON-JURY ☑ JURY ☑ VERDICT

☐ NEGOTIATED	☑ GUILTY ON COUNT(S) 12 & 13	☐ OTHER DISPOSITION
☐ GUILTY ON COUNT(S)	☐ NOT GUILTY ON COUNT(S)	☐ NOLLE PROSEQUI ORDER ON COUNT(S)
☐ NOLO CONTENDERE ON COUNT(S)	☐ GUILTY OF LESSER INCLUDED	☐ DEAD DOCKET ORDER ON COUNT(S)
☐ TO LESSER INCLUDED ON COUNT(S) OFFENSE(S)		☐ MERGED COUNT(S)

☑ **FELONY SENTENCE** ☐ **MISDEMEANOR SENTENCE**

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that the said defendant hereby sentenced to confinement for a period of 10 years – to serve – each count to run concurrent to each other & consecutive to counts 2 & 8 in the State Penal System or such other institution as the Commission of the State Department of Corrections or Court may direct, to be computed as provided by law. HOWEVER, it is further ordered by the Court

~~☐ 1) THAT the above sentence may be served on probation.~~

~~☐ 2) THAT upon service of _____ of the above sentence, the remainder of _____ may be served on probation PROVIDED that the said defendant complies with the following general and other conditions herein imposed by the Court as part of this sentence.~~

~~☐ GENERAL AND/OR OTHER CONDITIONS OF PROBATION~~

~~☐ 1) Do not violate the criminal laws of any governmental unit.~~
~~☐ 2) Avoid injurious and vicious habits – especially alcoholic consumption/intoxication and narcotics and other dangerous drugs unless prescribed lawfully.~~
~~☐ 3) Avoid persons or places of disreputable or harmful character.~~
~~☐ 4) Report to the Probation-Parole Supervisor as directed and permit such Supervisor to visit him (her) at home or elsewhere.~~
~~☐ 5) Work faithfully at suitable employment insofar as may be possible.~~
~~☐ 6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.~~
~~☐ 7) Support his (her) dependents to the best of his (her) ability.~~

~~____ 10% Jail Surcharge pursuant to O.C.G.A. 15-21-93~~
~~____ Per Month Probation Fee not to exceed 60 payments~~
~~____ Probation Surcharge pursuant to O.C.G.A. 42-6-34/15-21 A-6~~
~~____ 10% Brain and Spinal Injury Trust Fund pursuant to O.C.G.A. 15-21-149~~
~~____ 50% Drug Surcharge pursuant to O.C.G.A. 15-21-100~~
~~____ 5% Victim Assistance Surcharge pursuant to O.C.G.A. 15-21-131~~
~~____ DU Surcharge pursuant to O.C.G.A. 15-21-112~~
~~____ $50 or 10% POPIDF, whichever is less pursuant to O.C.G.A. 15-21-73(a)(1)(A)~~
~~____ 10% POPIDF of original fine pursuant to O.C.G.A. 15-21-73(a)(1)(B)~~
~~____ 5% of original fine for GA. Driver's Education Commission pursuant to O.C.G.A. 15-21-179~~
~~____ $100 Court Costs pursuant to O.C.G.A. 15-6-77(h)(7)~~

~~IT IS FURTHER ORDERED that the defendant pay a fine in the amount of _____ and pay victim restitution in the amount of _____ and restitution to the Cobb General Fund for costs for Court Appointed Attorney in the amount not to exceed _____. Defendant is to pay all fines, penalties and restitution as a condition of probation at the rate of $_____ per month beginning _____ days from _____.~~

~~SEE ADDENDUM "A" FOR SPECIAL CONDITIONS OF PROBATION~~

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

The defendant was represented by the Honorable John Hesmer Attorney at Law, Cobb County, by (Employment) ~~(Appointment)~~
Reported By: /s/ Marilyn Roe By the Court _____, 20____

So ordered this 27 day of Mar, 2007

/s/ Sonya Smith
Defendant

/s/ John Hesmer
Defendant's Attorney

James G. Bodiford
/s/ Judge, Cobb County Superior Court
Judge, Cobb Superior Court

/s/ Eleanor A. Dixon
Assistant District Attorney

March Term 2007 FINAL DISPOSITION

Filed in Open Court, this 27 day of March, 20 07 /s/ Tricia Crawford Deputy Clerk

Original – Clerk
Duplicate – District Attorney
Triplicate – Probation Officer
Quadruplicate – Jail

IN THE SUPERIOR COURT OF COBB COUNTY, GEORGIA

CRIMINAL ACTION NO. 06-9-2974-33
WARRANT NO. 03-W-12071 & 03-W-13192

The State

vs

Sonya Smith

/s/ Jay C. Stephenson
Jay C. Stephenson
Clerk of Superior Court Cobb County

OFFENSE(S) 1) Murder 2, 3, & 4) Felony Murder
5) Cruelty to Children – 1st Degree
6) Aggravated Assault 7) False Imprisonment

☐ PLEA ☐ NON-JURY ☐ JURY ☑ VERDICT

☐ NEGOTIATED ☑ GUILTY ON COUNT(S) 2 * ☑ OTHER DISPOSITION

☐ GUILTY ON COUNT(S) ☑ NOT GUILTY ON COUNT(S) 3, 4 & 7 ☐ NOLLE PROSEQUI ORDER ON COUNT(S)

☐ NOLO CONTENDERE ON COUNT(S) ☑ GUILTY OF LESSER INCLUDED ☐ DEAD DOCKET ORDER ON COUNT(S)

☐ TO LESSER INCLUDED ON COUNT(S) 1 ☑ MERGED COUNT(S) 1 into 2 6 into 5 5 into 2

OFFENSE(S) Involuntary Manslaughter

☑ **FELONY SENTENCE** ☐ **MISDEMEANOR SENTENCE**

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that the said defendant hereby sentenced to confinement for a period of life on Count 2 (Felony Murder)

in the State Penal System or such other institution as the Commission of the State Department of Corrections or Court may direct, to be computed as provided by law. HOWEVER, it is further ordered by the Court

~~☐ 1) THAT the above sentence may be served on probation.~~

~~☐ 2) THAT upon service of _____ of the above sentence, the remainder of _____ may be served on probation PROVIDED that the said defendant complies with the following general and other conditions herein imposed by the Court as part of this sentence.~~

~~☐ GENERAL AND/OR OTHER CONDITIONS OF PROBATION~~

~~☐ 1) Do not violate the criminal laws of any governmental unit.~~
~~☐ 2) Avoid injurious and vicious habits – especially alcoholic consumption/intoxication and narcotics and other dangerous drugs unless prescribed lawfully.~~
~~☐ 3) Avoid persons or places of disreputable or harmful character.~~
~~☐ 4) Report to the Probation-Parole Supervisor as directed and permit such Supervisor to visit him (her) at home or elsewhere.~~
~~☐ 5) Work faithfully at suitable employment insofar as may be possible.~~
~~☐ 6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.~~
~~☐ 7) Support his (her) dependents to the best of his (her) ability.~~

~~____ 10% Jail Surcharge pursuant to O.C.G.A. 15-21-93~~
~~____ Per Month Probation Fee not to exceed 60 payments~~
~~____ Probation Surcharge pursuant to O.C.G.A. 42-6-34/15-21 A-6~~
~~____ 10% Brain and Spinal Injury Trust Fund pursuant to O.C.G.A. 15-21-149~~
~~____ 50% Drug Surcharge pursuant to O.C.G.A. 15-21-100~~
~~____ 5% Victim Assistance Surcharge pursuant to O.C.G.A. 15-21-131~~
~~____ DU Surcharge pursuant to O.C.G.A. 15-21-112~~
~~____ $50 or 10% POPIDF, whichever is less pursuant to O.C.G.A. 15-21-73(a)(1)(A)~~
~~____ 10% POPIDF of original fine pursuant to O.C.G.A. 15-21-73(a)(1)(B)~~
~~____ 5% of original fine for GA. Driver's Education Commission pursuant to O.C.G.A. 15-21-179~~
~~____ $100 Court Costs pursuant to O.C.G.A. 15-6-77(h)(7)~~

~~IT IS FURTHER ORDERED that the defendant pay a fine in the amount of _____ and pay victim restitution in the amount of _____ and restitution to the Cobb General Fund for costs for Court Appointed Attorney in the amount not to exceed _____. Defendant is to pay all fines, penalties and restitution as a condition of probation at the rate of $_____ per month beginning _____ days from _____.~~

~~SEE ADDENDUM "A" FOR SPECIAL CONDITIONS OF PROBATION~~

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

The defendant was represented by the Honorable John Hesmer Attorney at Law, Cobb County, by (Employment) ~~(Appointment)~~
Reported By: /s/ Marilyn Roe By the Court _____, 20 _____

So ordered this 27 day of Mar, 2007
/s/ Sonya Smith
Defendant
/s/ John Hesmer
Defendant's Attorney

James G. Bodiford
/s/ Judge, Cobb County Superior Court
Judge, Cobb Superior Court
/s/ Eleanor A. Dixon
Assistant District Attorney

[*Ms. Smith was also found guilty on Counts 1, 5 and 6 but these charges merged]

Filed in Open Court, this 27 day of March Term 2007 March, 20 07 FINAL DISPOSITION
/s/ Tricia Crawford Deputy Clerk

Original – Clerk
Duplicate – District Attorney
Triplicate – Probation Officer
Quadruplicate – Jail

IN THE SUPERIOR COURT OF COBB COUNTY, GEORGIA

CRIMINAL ACTION NO. 06-9-2974-33
WARRANT NO. 03-W-12071 & 03-W-13192

The State

vs

Sonya Smith

/s/ Jay C. Stephenson
Jay C. Stephenson
Clerk of Superior Court Cobb County

OFFENSE(S) (14) Cruelty to Children – First Degree

☐ PLEA ☐ NON-JURY ☑ JURY ☑ VERDICT

☐ NEGOTIATED _____ ☑ GUILTY ON COUNT(S) 14 ☐ OTHER DISPOSITION _____

☐ GUILTY ON COUNT(S) _____ ☐ NOT GUILTY ON COUNT(S) _____ ☐ NOLLE PROSEQUI ORDER ON COUNT(S) _____

☐ NOLO CONTENDERE ON COUNT(S) _____ ☐ GUILTY OF LESSER INCLUDED _____ ☐ DEAD DOCKET ORDER ON COUNT(S) _____

☑ TO LESSER INCLUDED ON COUNT(S) 14 ☐ MERGED COUNT(S) _____

OFFENSE(S) Reckless Conduct

☐ **FELONY SENTENCE** ☑ **MISDEMEANOR SENTENCE**

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that the said defendant hereby sentenced to confinement for a period of 12 months – to serve – to run concurrent

in the State Penal System or such other institution as the Commission of the State Department of Corrections or Court may direct, to be computed as provided by law. HOWEVER, it is further ordered by the Court

~~☐ 1) THAT the above sentence may be served on probation.~~

~~☐ 2) THAT upon service of _____ of the above sentence, the remainder of _____ may be served on probation PROVIDED that the said defendant complies with the following general and other conditions herein imposed by the Court as part of this sentence.~~

~~☐ GENERAL AND/OR OTHER CONDITIONS OF PROBATION~~

~~☐ 1) Do not violate the criminal laws of any governmental unit.~~
~~☐ 2) Avoid injurious and vicious habits – especially alcoholic consumption/intoxication and narcotics and other dangerous drugs unless prescribed lawfully.~~
~~☐ 3) Avoid persons or places of disreputable or harmful character.~~
~~☐ 4) Report to the Probation-Parole Supervisor as directed and permit such Supervisor to visit him (her) at home or elsewhere.~~
~~☐ 5) Work faithfully at suitable employment insofar as may be possible.~~
~~☐ 6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.~~
~~☐ 7) Support his (her) dependents to the best of his (her) ability.~~

____ 10% Jail Surcharge pursuant to O.C.G.A. 15-21-93
____ Per Month Probation Fee not to exceed 60 payments
____ Probation Surcharge pursuant to O.C.G.A. 42-6-34/15-21 A-6
____ 10% Brain and Spinal Injury Trust Fund pursuant to O.C.G.A. 15-21-149
____ 50% Drug Surcharge pursuant to O.C.G.A. 15-21-100
____ 5% Victim Assistance Surcharge pursuant to O.C.G.A. 15-21-131
____ DU Surcharge pursuant to O.C.G.A. 15-21-112
____ $50 or 10% POPIDF, whichever is less pursuant to O.C.G.A. 15-21-73(a)(1)(A)
____ 10% POPIDF of original fine pursuant to O.C.G.A. 15-21-73(a)(1)(B)
____ 5% of original fine for GA. Driver's Education Commission pursuant to O.C.G.A. 15-21-179
____ $100 Court Costs pursuant to O.C.G.A. 15-6-77(h)(7)

IT IS FURTHER ORDERED that the defendant pay a fine in the amount of _____ and pay victim restitution in the amount of _____ and restitution to the Cobb General Fund for costs for Court Appointed Attorney in the amount not to exceed _____. Defendant is to pay all fines, penalties and restitution as a condition of probation at the rate of $_____ per month beginning _____ days from _____.

SEE ADDENDUM "A" FOR SPECIAL CONDITIONS OF PROBATION

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

The defendant was represented by the Honorable John Hesmer Attorney at Law, Cobb County, by (Employment) ~~(Appointment)~~
Reported By: /s/ Marilyn Roe By the Court _____, 20 _____

So ordered this 27 day of Mar, 2007

/s/ Sonya Smith
Defendant

/s/ John Hesmer
Defendant's Attorney

James G. Bodiford
/s/ Judge, Cobb County Superior Court
Judge, Cobb Superior Court

/s/ Eleanor A. Dixon
Assistant District Attorney

Filed in Open Court, this 27 day of March Term 2007
March, 20 07 /s/ Tricia Crawford Deputy Clerk

FINAL DISPOSITION

Original – Clerk
Duplicate – District Attorney
Triplicate – Probation Officer
Quadruplicate – Jail

IN THE SUPERIOR COURT OF COBB COUNTY, GEORGIA

CRIMINAL ACTION NO. 06-9-2974-33
WARRANT NO. 03-W-12071 & 03-W-13192

The State

vs

Sonya Smith

/s/ Jay C. Stephenson
Jay C. Stephenson
Clerk of Superior Court Cobb County

OFFENSE(S) 8 & 10) Cruelty to Children – 1st Degree
9 & 11) Aggravated Assault

☐ PLEA ☐ NON-JURY ☑ JURY ☑ VERDICT

☐ NEGOTIATED _____ ☑ GUILTY ON COUNT(S) 8* ☑ OTHER DISPOSITION _____

☐ GUILTY ON COUNT(S) _____ ☐ NOT GUILTY ON COUNT(S) _____ ☐ NOLLE PROSEQUI ORDER ON COUNT(S) _____

☐ NOLO CONTENDERE ON COUNT(S) _____ ☐ GUILTY OF LESSER INCLUDED _____ ☐ DEAD DOCKET ORDER ON COUNT(S) _____

☐ TO LESSER INCLUDED ON COUNT(S) _____ ☑ MERGED COUNT(S) 9 into 8 11 into 10 10 into 8

OFFENSE(S) _____

☑ FELONY SENTENCE **☐ MISDEMEANOR SENTENCE**

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that the said defendant hereby sentenced to confinement for a period of 20 years – to serve to run consecutive to Count 2

in the State Penal System or such other institution as the Commission of the State Department of Corrections or Court may direct, to be computed as provided by law. HOWEVER, it is further ordered by the Court

~~☐ 1) THAT the above sentence may be served on probation.~~

~~☐ 2) THAT upon service of _____ of the above sentence, the remainder of _____ may be served on probation PROVIDED that the said defendant complies with the following general and other conditions herein imposed by the Court as part of this sentence.~~

~~☐ GENERAL AND/OR OTHER CONDITIONS OF PROBATION~~

~~☐ 1) Do not violate the criminal laws of any governmental unit.~~
~~☐ 2) Avoid injurious and vicious habits – especially alcoholic consumption/intoxication and narcotics and other dangerous drugs unless prescribed lawfully.~~
~~☐ 3) Avoid persons or places of disreputable or harmful character.~~
~~☐ 4) Report to the Probation-Parole Supervisor as directed and permit such Supervisor to visit him (her) at home or elsewhere.~~
~~☐ 5) Work faithfully at suitable employment insofar as may be possible.~~
~~☐ 6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.~~
~~☐ 7) Support his (her) dependents to the best of his (her) ability.~~

_____ 10% Jail Surcharge pursuant to O.C.G.A. 15-21-93
_____ Per Month Probation Fee not to exceed 60 payments
_____ Probation Surcharge pursuant to O.C.G.A. 42-6-34/15-21 A-6
_____ 10% Brain and Spinal Injury Trust Fund pursuant to O.C.G.A. 15-21-149
_____ 50% Drug Surcharge pursuant to O.C.G.A. 15-21-100
_____ 5% Victim Assistance Surcharge pursuant to O.C.G.A. 15-21-131
_____ DU Surcharge pursuant to O.C.G.A. 15-21-112
_____ $50 or 10% POPIDF, whichever is less pursuant to O.C.G.A. 15-21-73(a)(1)(A)
_____ 10% POPIDF of original fine pursuant to O.C.G.A. 15-21-73(a)(1)(B)
_____ 5% of original fine for GA. Driver's Education Commission pursuant to O.C.G.A. 15-21-179
_____ $100 Court Costs pursuant to O.C.G.A. 15-6-77(h)(7)

IT IS FURTHER ORDERED that the defendant pay a fine in the amount of _____ and pay victim restitution in the amount of _____ and restitution to the Cobb General Fund for costs for Court Appointed Attorney in the amount not to exceed _____. Defendant is to pay all fines, penalties and restitution as a condition of probation at the rate of $_____ per month beginning _____ days from _____.

SEE ADDENDUM "A" FOR SPECIAL CONDITIONS OF PROBATION

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any conditions of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

The defendant was represented by the Honorable John Hesmer Attorney at Law, Cobb County, by [Employment] ~~(Appointment)~~
Reported By: /s/ Marilyn Roe By the Court _____, 20 _____

So ordered this 27 day of Mar, 2007

/s/ Sonya Smith
Defendant
/s/ John Hesmer
Defendant's Attorney

James G. Bodiford
/s/ Judge, Cobb County Superior Court
Judge, Cobb Superior Court
/s/ Eleanor A. Dixon
Assistant District Attorney

[* Ms. Smith was also found guilty on Counts 9, 10 & 11 but the charges merged]

March Term 2007 FINAL DISPOSITION

Filed in Open Court, this 27 day of March, 20 07 /s/ Tricia Crawford Deputy Clerk

Original – Clerk
Duplicate – District Attorney
Triplicate – Probation Officer
Quadruplicate – Jail

IN THE SUPERIOR COURT OF COBB COUNTY, GEORGIA

CRIMINAL ACTION NO. 06-9-2974-33
WARRANT NO. 03-W-13191 & 03-W-12072

The State

vs

Joseph Smith

/s/ Jay C. Stephenson
Jay C. Stephenson
Clerk of Superior Court Cobb County

OFFENSE(S) 1) Murder 2, 3 & 4) Felony Murder
5) Cruelty to Children – 1st Degree
6) Aggravated Assault 7) False Imprisonment

☐ PLEA ☐ NON-JURY ☑ JURY ☑ VERDICT

☐ NEGOTIATED

☑ GUILTY ON COUNT(S) 2 *

☑ OTHER DISPOSITION

☐ GUILTY ON COUNT(S)

☑ NOT GUILTY ON COUNT(S) 3, 4 & 7

☐ NOLLE PROSEQUI ORDER ON COUNT(S)

☐ NOLO CONTENDERE ON COUNT(S)

☑ GUILTY OF LESSER INCLUDED

☐ DEAD DOCKET ORDER ON COUNT(S)

☑ TO LESSER INCLUDED ON COUNT(S) 1
OFFENSE(S) Involuntary Manslaughter

☑ MERGED COUNT(S) 1 into 2
6 into 5 5 into 2

☑ FELONY SENTENCE **☐ MISDEMEANOR SENTENCE**

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that the said defendant hereby sentenced to confinement for a period of life on Count 2 – Felony Murder

in the State Penal System or such other institution as the Commission of the State Department of Corrections or Court may direct, to be computed as provided by law. HOWEVER, it is further ordered by the Court

~~☐ 1) THAT the above sentence may be served on probation.~~

~~☐ 2) THAT upon service of _____ of the above sentence, the remainder of _____ may be served on probation PROVIDED that the said defendant complies with the following general and other conditions herein imposed by the Court as part of this sentence.~~

~~☐ GENERAL AND/OR OTHER CONDITIONS OF PROBATION~~

~~☐ 1) Do not violate the criminal laws of any governmental unit.~~
~~☐ 2) Avoid injurious and vicious habits – especially alcoholic consumption/intoxication and narcotics and other dangerous drugs unless prescribed lawfully.~~
~~☐ 3) Avoid persons or places of disreputable or harmful character.~~
~~☐ 4) Report to the Probation-Parole Supervisor as directed and permit such Supervisor to visit him (her) at home or elsewhere.~~
~~☐ 5) Work faithfully at suitable employment insofar as may be possible.~~
~~☐ 6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.~~
~~☐ 7) Support his (her) dependents to the best of his (her) ability.~~

~~____ 10% Jail Surcharge pursuant to O.C.G.A. 15-21-93~~
~~____ Per Month Probation Fee not to exceed 60 payments~~
~~____ Probation Surcharge pursuant to O.C.G.A. 42-6-34/15-21 A-6~~
~~____ 10% Brain and Spinal Injury Trust Fund pursuant to O.C.G.A. 15-21-149~~
~~____ 50% Drug Surcharge pursuant to O.C.G.A. 15-21-100~~
~~____ 5% Victim Assistance Surcharge pursuant to O.C.G.A. 15-21-131~~
~~____ DU Surcharge pursuant to O.C.G.A. 15-21-112~~
~~____ $50 or 10% POPIDF, whichever is less pursuant to O.C.G.A. 15-21-73(a)(1)(A)~~
~~____ 10% POPIDF of original fine pursuant to O.C.G.A. 15-21-73(a)(1)(B)~~
~~____ 5% of original fine for GA. Driver's Education Commission pursuant to O.C.G.A. 15-21-179~~
~~____ $100 Court Costs pursuant to O.C.G.A. 15-6-77(h)(7)~~

~~IT IS FURTHER ORDERED that the defendant pay a fine in the amount of _____ and pay victim restitution in the amount of _____ and restitution to the Cobb General Fund for costs for Court Appointed Attorney in the amount not to exceed _____. Defendant is to pay all fines, penalties and restitution as a condition of probation at the rate of $_____ per month beginning _____ days from _____.~~

~~SEE ADDENDUM "A" FOR SPECIAL CONDITIONS OF PROBATION~~

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any conditions of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

The defendant was represented by the Honorable Manubir Arora Attorney at Law, Fulton County, by (Employment) ~~(Appointment)~~
Reported By: /s/ Marilyn Roe By the Court _____, 20 _____

So ordered this 27 day of Mar, 2007
/s/ Joseph L. Smith
Defendant
/s/ Manubir Arora
Defendant's Attorney

James G. Bodiford
/s/ Judge, Cobb County Superior Court
Judge, Cobb Superior Court
/s/ Eleanor A. Dixon
Assistant District Attorney

[* Mr. Smith was also found guilty on Counts 1, 5 & 6 but the sentences merged]

Filed in Open Court, this 27 day of March Term 2007 March, 20 07 FINAL DISPOSITION /s/ Tricia Crawford Deputy Clerk

Original – Clerk
Duplicate – District Attorney
Triplicate – Probation Officer
Quadruplicate – Jail

IN THE SUPERIOR COURT OF COBB COUNTY, GEORGIA

CRIMINAL ACTION NO. 06-9-2974-33
WARRANT NO. 03-W-13191 & 03-W-12072

The State

vs

Joseph Smith

/s/ Jay C. Stephenson
Jay C. Stephenson
Clerk of Superior Court Cobb County

OFFENSE(S) 8 & 10) Cruelty to Children – 1st Degree
9 & 11) Aggravated Assault

☐ PLEA ☐ NON-JURY ☐ JURY ☑ VERDICT

☐ NEGOTIATED ☑ GUILTY ON COUNT(S) 8 * ☑ OTHER DISPOSITION

☐ GUILTY ON COUNT(S) ☐ NOT GUILTY ON COUNT(S) ☐ NOLLE PROSEQUI ORDER ON COUNT(S)

☐ NOLO CONTENDERE ON COUNT(S) ☐ GUILTY OF LESSER INCLUDED ☐ DEAD DOCKET ORDER ON COUNT(S)

☐ TO LESSER INCLUDED OFFENSE(S) ON COUNT(S) ☑ MERGED COUNT(S) 9 into 8, 11 into 10, 10 into 8

☑ **FELONY SENTENCE** ☐ **MISDEMEANOR SENTENCE**

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that the said defendant hereby sentenced to confinement for a period of 20 years – to serve – to run consecutive to Count 2

in the State Penal System or such other institution as the Commission of the State Department of Corrections or Court may direct, to be computed as provided by law. HOWEVER, it is further ordered by the Court

~~☐ 1) THAT the above sentence may be served on probation.~~

~~☐ 2) THAT upon service of _____ of the above sentence, the remainder of _____ may be served on probation PROVIDED that the said defendant complies with the following general and other conditions herein imposed by the Court as part of this sentence.~~

~~☐ GENERAL AND/OR OTHER CONDITIONS OF PROBATION~~

~~☐ 1) Do not violate the criminal laws of any governmental unit.~~
~~☐ 2) Avoid injurious and vicious habits – especially alcoholic consumption/intoxication and narcotics and other dangerous drugs unless prescribed lawfully.~~
~~☐ 3) Avoid persons or places of disreputable or harmful character.~~
~~☐ 4) Report to the Probation-Parole Supervisor as directed and permit such Supervisor to visit him (her) at home or elsewhere.~~
~~☐ 5) Work faithfully at suitable employment insofar as may be possible.~~
~~☐ 6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.~~
~~☐ 7) Support his (her) dependents to the best of his (her) ability.~~

____ 10% Jail Surcharge pursuant to O.C.G.A. 15-21-93
____ Per Month Probation Fee not to exceed 60 payments
____ Probation Surcharge pursuant to O.C.G.A. 42-6-34/15-21 A-6
____ 10% Brain and Spinal Injury Trust Fund pursuant to O.C.G.A. 15-21-149
____ 50% Drug Surcharge pursuant to O.C.G.A. 15-21-100
____ 5% Victim Assistance Surcharge pursuant to O.C.G.A. 15-21-131
____ DU Surcharge pursuant to O.C.G.A. 15-21-112
____ $50 or 10% POPIDF, whichever is less pursuant to O.C.G.A. 15-21-73(a)(1)(A)
____ 10% POPIDF of original fine pursuant to O.C.G.A. 15-21-73(a)(1)(B)
____ 5% of original fine for GA. Driver's Education Commission pursuant to O.C.G.A. 15-21-179
____ $100 Court Costs pursuant to O.C.G.A. 15-6-77(h)(7)

IT IS FURTHER ORDERED that the defendant pay a fine in the amount of _____ and pay victim restitution in the amount of _____ and restitution to the Cobb General Fund for costs for Court Appointed Attorney in the amount not to exceed _____. Defendant is to pay all fines, penalties and restitution as a condition of probation at the rate of $_____ per month beginning _____ days from _____.

~~SEE ADDENDUM "A" FOR SPECIAL CONDITIONS OF PROBATION~~

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any conditions of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

The defendant was represented by the Honorable Manubir Arora Attorney at Law, Fulton County, by (Employment) ~~(Appointment)~~
Reported By: /s/ Marilyn Roe By the Court _____, 20 _____

So ordered this 27 day of Mar, 2007

/s/ Joseph L. Smith
Defendant

/s/ Manubir Arora
Defendant's Attorney

James G. Bodiford
/s/ Judge, Cobb County Superior Court
Judge, Cobb Superior Court

/s/ Eleanor A. Dixon
Assistant District Attorney

[* Mr. Smith was also found guilty of Counts 9, 10 & 11 but the sentences merged]

March Term 2007 FINAL DISPOSITION

Filed in Open Court, this 27 day of March, 20 07 /s/ Tricia Crawford Deputy Clerk

Original – Clerk
Duplicate – District Attorney
Triplicate – Probation Officer
Quadruplicate – Jail

IN THE SUPERIOR COURT OF COBB COUNTY, GEORGIA

CRIMINAL ACTION NO. 06-9-2974-33
WARRANT NO. 03-W-13191 & 03-W-12072

The State

vs

Joseph Smith

(s) Jay C. Stephenson
Jay C. Stephenson
Clerk of Superior Court Cobb County

OFFENSE(S) 8 & 10) Cruelty to Children – 1st Degree
9 & 11) Aggravated Assault

☐ PLEA ☐ NON-JURY ☐ JURY ☑ VERDICT

☐ NEGOTIATED ☑ GUILTY ON COUNT(S) 8* ☑ OTHER DISPOSITION

☐ GUILTY ON COUNT(S) ☐ NOT GUILTY ON COUNT(S) ☐ NOLLE PROSEQUI ORDER ON COUNT(S)

☐ NOLO CONTENDERE ON COUNT(S) ☐ GUILTY OF LESSER INCLUDED ☐ DEAD DOCKET ORDER ON COUNT(S)

☐ TO LESSER INCLUDED ON COUNT(S) OFFENSE(S) ☑ MERGED COUNT(S) 9 into 8 11 into 10 10 into 8

☑ **FELONY SENTENCE** ☐ **MISDEMEANOR SENTENCE**

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that the said defendant hereby sentenced to confinement for a period of 20 years – to serve – to run consecutive to Count 2

in the State Penal System or such other institution as the Commission of the State Department of Corrections or Court may direct, to be computed as provided by law. HOWEVER, it is further ordered by the Court

~~☐ 1) THAT the above sentence may be served on probation.~~

~~☐ 2) THAT upon service of _____ of the above sentence, the remainder of _____ may be served on probation PROVIDED that the said defendant complies with the following general and other conditions herein imposed by the Court as part of this sentence.~~

~~☐ GENERAL AND/OR OTHER CONDITIONS OF PROBATION~~

~~☐ 1) Do not violate the criminal laws of any governmental unit.~~
~~☐ 2) Avoid injurious and vicious habits – especially alcoholic consumption intoxication and narcotics and other dangerous drugs unless prescribed lawfully.~~
~~☐ 3) Avoid persons or places of disreputable or harmful character.~~
~~☐ 4) Report to the Probation-Parole Supervisor as directed and permit such Supervisor to visit him (her) at home or elsewhere.~~
~~☐ 5) Work faithfully at suitable employment insofar as may be possible.~~
~~☐ 6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.~~
~~☐ 7) Support his (her) dependents to the best of his (her) ability.~~

____ 10% Jail Surcharge pursuant to O.C.G.A. 15-21-93
____ Per Month Probation Fee not to exceed 60 payments
____ Probation Surcharge pursuant to O.C.G.A. 42-6-34/15-21 A-6
____ 10% Brain and Spinal Injury Trust Fund pursuant to O.C.G.A. 15-21-149
____ 50% Drug Surcharge pursuant to O.C.G.A. 15-21-100
____ 5% Victim Assistance Surcharge pursuant to O.C.G.A. 15-21-131
____ DU Surcharge pursuant to O.C.G.A. 15-21-112
____ $50 or 10% POPIDF, whichever is less pursuant to O.C.G.A. 15-21-73(a)(1)(A)
____ 10% POPIDF of original fine pursuant to O.C.G.A. 15-21-73(a)(1)(B)
____ 5% of original fine for GA. Driver's Education Commission pursuant to O.C.G.A. 15-21-179
____ $100 Court Costs pursuant to O.C.G.A. 15-6-77(h)(7)

IT IS FURTHER ORDERED that the defendant pay a fine in the amount of _____ and pay victim restitution in the amount of _____ and restitution to the Cobb General Fund for costs for Court Appointed Attorney in the amount not to exceed _____. Defendant is to pay all fines, penalties and restitution as a condition of probation at the rate of $_____per month beginning _____ days from _____.

~~SEE ADDENDUM "A" FOR SPECIAL CONDITIONS OF PROBATION~~

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any conditions of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

The defendant was represented by the Honorable Manubir Arora Attorney at Law, Fulton County, by (Employment) ~~(Appointment)~~
Reported By: /s/ Marilyn Roe By the Court _____, 20 _____

So ordered this 27 day of Mar, 2007

/s/ Joseph L. Smith
Defendant

/s/ Manubir Arora
Defendant's Attorney

James G. Bodiford
/s/ Judge, Cobb County Superior Court
Judge, Cobb Superior Court

/s/ Eleanor A. Dixon
Assistant District Attorney

[* Mr. Smith was also found guilty of Counts 9, 10 & 11 but the sentences merged]

March Term 2007 FINAL DISPOSITION
Filed in Open Court, this 27 day of March, 20 07 /s/ Tricia Crawford Deputy Clerk

Original – Clerk
Duplicate – District Attorney
Triplicate – Probation Officer
Quadruplicate – Jail

IN THE SUPERIOR COURT OF COBB COUNTY, GEORGIA

CRIMINAL ACTION NO. 06-9-2974-33
WARRANT NO. 03-W-13191 & 03-W-12072

The State

vs

Joseph Smith

/s/ Jay C. Stephenson
Jay C. Stephenson
Clerk of Superior Court Cobb County

OFFENSE(S) 12) Cruelty to Children – First Degree
13) False Imprisonment

☐ PLEA ☐ NON-JURY ☑ JURY ☑ VERDICT

☐ NEGOTIATED	☑ GUILTY ON COUNT(S) 12 & 13	☐ OTHER DISPOSITION
☐ GUILTY ON COUNT(S)	☐ NOT GUILTY ON COUNT(S)	☐ NOLLE PROSEQUI ORDER ON COUNT(S)
☐ NOLO CONTENDERE ON COUNT(S)	☐ GUILTY OF LESSER INCLUDED	☐ DEAD DOCKET ORDER ON COUNT(S)
☐ TO LESSER INCLUDED ON COUNT(S) OFFENSE(S)		☐ MERGED COUNT(S)

☑ **FELONY SENTENCE** ☐ **MISDEMEANOR SENTENCE**

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that the said defendant hereby sentenced to confinement for a period of 10 years – to serve – to run concurrent to each other & consecutive to Counts 2 & 8 in the State Penal System or such other institution as the Commission of the State Department of Corrections or Court may direct, to be computed as provided by law. HOWEVER, it is further ordered by the Court

~~☐ 1) THAT the above sentence may be served on probation.~~

~~☐ 2) THAT upon service of _____ of the above sentence, the remainder of _____ may be served on probation PROVIDED that the said defendant complies with the following general and other conditions herein imposed by the Court as part of this sentence.~~

~~☐ GENERAL AND/OR OTHER CONDITIONS OF PROBATION~~

~~☐ 1) Do not violate the criminal laws of any governmental unit.~~
~~☐ 2) Avoid injurious and vicious habits – especially alcoholic consumption/intoxication and narcotics and other dangerous drugs unless prescribed lawfully.~~
~~☐ 3) Avoid persons or places of disreputable or harmful character.~~
~~☐ 4) Report to the Probation-Parole Supervisor as directed and permit such Supervisor to visit him (her) at home or elsewhere.~~
~~☐ 5) Work faithfully at suitable employment insofar as may be possible.~~
~~☐ 6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.~~
~~☐ 7) Support his (her) dependents to the best of his (her) ability.~~

____ 10% Jail Surcharge pursuant to O.C.G.A. 15-21-93
____ Per Month Probation Fee not to exceed 60 payments
____ Probation Surcharge pursuant to O.C.G.A. 42-6-34/15-21 A-6
____ 10% Brain and Spinal Injury Trust Fund pursuant to O.C.G.A. 15-21-149
____ 50% Drug Surcharge pursuant to O.C.G.A. 15-21-100
____ 5% Victim Assistance Surcharge pursuant to O.C.G.A. 15-21-131
____ DU Surcharge pursuant to O.C.G.A. 15-21-112
____ $50 or 10% POPIDF, whichever is less pursuant to O.C.G.A. 15-21-73(a)(1)(A)
____ 10% POPIDF of original fine pursuant to O.C.G.A. 15-21-73(a)(1)(B)
____ 5% of original fine for GA. Driver's Education Commission pursuant to O.C.G.A. 15-21-179
____ $100 Court Costs pursuant to O.C.G.A. 15-6-77(h)(7)

IT IS FURTHER ORDERED that the defendant pay a fine in the amount of _____ and pay victim restitution in the amount of _____ and restitution to the Cobb General Fund for costs for Court Appointed Attorney in the amount not to exceed _____. Defendant is to pay all fines, penalties and restitution as a condition of probation at the rate of $_____ per month beginning _____ days from _____.

~~SEE ADDENDUM "A" FOR SPECIAL CONDITIONS OF PROBATION~~

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any conditions of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

The defendant was represented by the Honorable Manubir Arora Attorney at Law, Fulton County, by (Employment) ~~(Appointment)~~
Reported By: /s/ Marilyn Roe By the Court _____, 20 _____

So ordered this 27 day of Mar, 2007
/s/ Joseph L. Smith
Defendant
/s/ Manubir Arora
Defendant's Attorney

James G. Bodiford
/s/ Judge, Cobb County Superior Court
Judge, Cobb Superior Court
/s/ Eleanor A. Dixon
Assistant District Attorney

Filed in Open Court, this 27 day of March Term 2007
March, 20 07 /s/ Tricia Crawford Deputy Clerk

FINAL DISPOSITION

Original – Clerk
Duplicate – District Attorney
Triplicate – Probation Officer
Quadruplicate – Jail

IN THE SUPERIOR COURT OF COBB COUNTY, GEORGIA

CRIMINAL ACTION NO. 06-9-2974-33
WARRANT NO. 03-W-13191 & 03-W-12072

The State

vs

Joseph Smith

/s/ Jay C. Stephenson
Jay C. Stephenson
Clerk of Superior Court Cobb County

OFFENSE(S) 14) Cruelty to Children – First Degree

☐ PLEA ☐ NON-JURY ☑ JURY ☑ VERDICT

☐ NEGOTIATED ☑ GUILTY ON COUNT(S) 14 ☐ OTHER DISPOSITION

☐ GUILTY ON COUNT(S) ☐ NOT GUILTY ON COUNT(S) ☐ NOLLE PROSEQUI ORDER ON COUNT(S)

☐ NOLO CONTENDERE ON COUNT(S) ☐ GUILTY OF LESSER INCLUDED ☐ DEAD DOCKET ORDER ON COUNT(S)

☑ TO LESSER INCLUDED ON COUNT(S) 14 ☐ MERGED COUNT(S)

OFFENSE(S) Reckless Conduct

☐ **FELONY SENTENCE** ☑ **MISDEMEANOR SENTENCE**

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that the said defendant hereby sentenced to confinement for a period of 12 months – to serve to run concurrent

in the State Penal System or such other institution as the Commission of the State Department of Corrections or Court may direct, to be computed as provided by law. HOWEVER, it is further ordered by the Court

~~☐ 1) THAT the above sentence may be served on probation.~~

~~☐ 2) THAT upon service of _____ of the above sentence, the remainder of _____ may be served on probation PROVIDED that the said defendant complies with the following general and other conditions herein imposed by the Court as part of this sentence.~~

~~☐ GENERAL AND/OR OTHER CONDITIONS OR PROBATION~~

☐ 1) Do not violate the criminal laws of any governmental unit.
☐ 2) Avoid injurious and vicious habits – especially alcoholic consumption/intoxication and narcotics and other dangerous drugs unless prescribed lawfully.
☐ 3) Avoid persons or places of disreputable or harmful character.
☐ 4) Report to the Probation-Parole Supervisor as directed and permit such Supervisor to visit him (her) at home or elsewhere.
☐ 5) Work faithfully at suitable employment insofar as may be possible.
☐ 6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.
☐ 7) Support his (her) dependents to the best of his (her) ability.

~~____ 10% Jail Surcharge pursuant to O.C.G.A. 15-21-93~~
~~____ Per Month Probation Fee not to exceed 60 payments~~
~~____ Probation Surcharge pursuant to O.C.G.A. 42-6-34/15-21 A-6~~
~~____ 10% Brain and Spinal Injury Trust Fund pursuant to O.C.G.A. 15-21-149~~
~~____ 50% Drug Surcharge pursuant to O.C.G.A. 15-21-100~~
~~____ 5% Victim Assistance Surcharge pursuant to O.C.G.A. 15-21-131~~
~~____ DU Surcharge pursuant to O.C.G.A. 15-21-112~~
~~____ $50 or 10% POPIDF, whichever is less pursuant to O.C.G.A. 15-21-73(a)(1)(A)~~
~~____ 10% POPIDF of original fine pursuant to O.C.G.A. 15-21-73(a)(1)(B)~~
~~____ 5% of original fine for GA. Driver's Education Commission pursuant to O.C.G.A. 15-21-179~~
~~____ $100 Court Costs pursuant to O.C.G.A. 15-6-77(h)(7)~~

~~IT IS FURTHER ORDERED that the defendant pay a fine in the amount of _____ and pay victim restitution in the amount of _____ and restitution to the Cobb General Fund for costs for Court Appointed Attorney in the amount not to exceed _____. Defendant is to pay all fines, penalties and restitution as a condition of probation at the rate of $_____ per month beginning _____ days from _____.~~

~~SEE ADDENDUM "A" FOR SPECIAL CONDITIONS OF PROBATION~~

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any conditions of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

The defendant was represented by the Honorable Manubir Arora Attorney at Law, Fulton County, by (Employment) ~~(Appointment)~~
Reported By: /s/ Marilyn Roe By the Court _____, 20 _____

So ordered this 27 day of Mar, 2007
/s/ Joseph L. Smith
Defendant
/s/ Manubir Arora
Defendant's Attorney

James G. Bodiford
/s/ Judge, Cobb County Superior Court
Judge, Cobb Superior Court
/s/ Eleanor A. Dixon
Assistant District Attorney

March Term 2007 FINAL DISPOSITION
Filed in Open Court, this 27 day of March, 20 07 /s/ Tricia Crawford Deputy Clerk

Original – Clerk
Duplicate – District Attorney
Triplicate – Probation Officer
Quadruplicate – Jail

[SEAL] SUPREME COURT OF GEORGIA
Case No. S10A1281

Atlanta, December 14, 2010

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

SONYA SMITH v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunstein, C.J., and Benham, J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ [Illegible], Clerk

RECORD
AND
BRIEFS

No. 10-1093

Supreme Court, U.S.
FILED
MAY 31 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOSEPH SMITH and SONYA SMITH,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

JASON C. FISHER
Counsel of Record for Respondent
Assistant Attorney General

SAMUEL S. OLENS
Attorney General

MARY BETH WESTMORELAND
Deputy Attorney General

PAULA K. SMITH
Senior Assistant Attorney General

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QUESTIONS PRESENTED

I.

Should this Court grant certiorari to consider whether unobjected-to, intentional conduct by a prosecutor in closing argument creates a due process violation that requires a trial judge to stop the proceeding *sua sponte*?

II.

Should this Court grant certiorari to consider whether defense counsel rendered effective assistance under the Sixth Amendment to the Constitution when counsel made a strategic decision not to object to the argument of the prosecutor rather than offend the jury by appearing to disrupt the prosecutor's argument and when the jury may have even been alienated by the prosecutor's argument?

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RESPONDENT'S BRIEF IN OPPOSITION

I. STATEMENT OF THE CASE

Petitioners Joseph and Sonya Smith (hereinafter "Petitioners") were jointly indicted by the Cobb County, Georgia, grand jury on June 15, 2006, for malice murder of their son, Josef Smith, three counts of felony murder (with cruelty to children, aggravated assault, and false imprisonment as the underlying felonies), five counts of first degree cruelty to children, three counts of aggravated assault, and two counts of false imprisonment. (R. 4-12).[1]

At a jury trial held on February 5-14, 2007, at which the Petitioners were jointly tried, they were found guilty of involuntary manslaughter (as a lesser included offense of malice murder), one count of felony murder (cruelty to children), four counts of cruelty to children, all three counts of aggravated assault, one count of false imprisonment, and reckless conduct (as a lesser included offense of the remaining false imprisonment count). (R. 206-23, 236-39). At sentencing, both Petitioners were sentenced to life imprisonment for felony murder; twenty consecutive years for cruelty to children (striking Josef with a glue stick); ten years for cruelty to children (confining Josef to a small room) and false imprisonment (confining Josef to a small room), with these sentences to

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[1] Citations to the clerk's record prepared for direct appeal are "R"; citations to the trial transcript are "T"; citations to the motion for new trial transcript are "MNT."

run concurrent with each other and consecutive to the felony murder and cruelty to children (striking with a glue stick) counts; and twelve months for reckless conduct, to run concurrent with the felony murder and cruelty to children (striking with a glue stick) counts. The involuntary manslaughter, cruelty to children (striking Josef in the head and confining him in a box), and aggravated assault (using unknown object to strike Josef in the head) counts were merged into the felony murder count for sentencing purposes; and the remaining aggravated assault charges (striking with a glue stick and unknown objects) and cruelty to children charge (striking with unknown objects) were merged into the cruelty to children charge upon which the Smiths were sentenced (striking with a glue stick) for sentencing purposes. (R. 205-08).

Petitioners filed a timely notice of appeal. (R. 1-2).

On direct appeal, Petitioner Sonya Smith enumerated eight errors:

> (1) the evidence was insufficient to support the convictions;
>
> (2) the trial court erred in allowing the prosecutor to dim the lights in the courtroom, bring out a cake with lit candles, and sing "Happy Birthday" to the deceased victim during her closing argument;
>
> (3) the trial court erred in denying Petitioner's motion for a mistrial after her son,

Mykel, testified that the Smiths prayed that they had not "los[t] another son" after they pulled an unresponsive Josef from the box in which he had been placed;

(4) the trial court erred by denying Petitioner's motion for a new trial because the jury's verdict finding her guilty of involuntary manslaughter as a lesser included offense of malice murder was "mutually exclusive" from the jury's verdict finding her guilty of felony murder;

(5) the trial court erred by failing to properly advise Petitioner regarding her right to testify when her counsel announced that she would not be testifying on her own behalf;

(6) the trial court erred by overruling Joseph Smith's counsel's objection to the prosecutor asking a State's witness to rate the injuries suffered by the deceased in comparison to other cases that the witness had seen;

(7) the trial court erred in refusing to admit into evidence at the motion for new trial hearing a Court TV video recording of the prosecutor's closing argument; and

(8) trial counsel was ineffective because:

> (a) counsel failed to have voir dire recorded, (b) counsel failed to object to the prosecutor asking a witness to compare the victim's injuries in this case to others that he had seen, (c) counsel failed to object to Joseph Smith's counsel asking a State's witness about the severity of the

> victim's injuries, (d) counsel failed to object to references at trial to a court ruling regarding the custody of the Smiths' remaining children, (e) counsel failed to make a record of his agreement with the prosecutor stating that evidence of the Smiths' other deceased child would not be admitted at trial, (f) counsel failed to effectively cross-examine several State's witnesses, (g) counsel failed to make a closing argument, (h) counsel failed to object to the prosecutor's "Happy Birthday" song during closing argument, (i) counsel failed to present good character evidence at trial, and (j) counsel failed in his overall performance at trial, as evidenced by the cumulative effects of errors (a)-(i) outlined above.

(Petition, App. 3, 4, 5, 6, 7, 8).

On direct appeal, Petitioner Joseph Smith enumerated four errors:

> (1) the evidence was insufficient to enable a rational trier of fact to find Petitioner guilty of all the crimes for which he was convicted;
>
> (2) trial counsel was ineffective because he was acting under a conflict of interest;
>
> (3) trial counsel was ineffective because counsel failed to object to the prosecutor singing "Happy Birthday" during closing argument; and

> (4) the trial court erred by failing to merge Petitioner's conviction for felony murder into his voluntary manslaughter conviction for sentencing purposes because the verdicts on those counts were mutually exclusive.

(Petition, App. 13, 14, 16).

The Georgia Supreme Court found these enumerations of error were waived and/or lacked merit and affirmed Petitioners' convictions and sentences on November 8, 2010. *Smith v. State*, 288 Ga. 348, 703 S.E.2d 629 (2010). Two Justices dissented to the majority's decision on two related enumerated errors– i.e., the appellate court's ability to decide the "Happy Birthday" issue under a plain error analysis, and the ineffective assistance of trial counsel claim regarding counsel's failure to object to the prosecutor singing "Happy Birthday" during closing argument. *Id.* at 357-63. Petitioners moved for reconsideration; however, their motion was denied on December 14, 2010. *Id.*

Petitioners filed this petition seeking review of a substantive due process claim that was not raised below. (Petition, pp. 9, 14). They only challenged the prosecutor's closing argument demonstration on appeal in the context of trial court error and an ineffective assistance claim.

Due to the nature of the issue presented, Respondent relies on the facts found by the Supreme Court of Georgia on direct appeal. Those facts are as follows:

> [v]iewed in the light most favorable to the jury's verdict, the record reveals that Joseph and Sonya Smith routinely disciplined their son, Josef, by beating him with glue sticks, belts, and heated coat hangers; locking him in confined spaces for extended periods of time; and tying his hands with rope. During the day on October 8, 2003, Joseph disciplined Josef several times, striking him repeatedly with a foot long glue stick. At one point, Josef began complaining of severe stomach pains and had urine that was brownish in color. Later, while Joseph was taking a shower, Sonya Smith beat Josef with a glue stick, drawing blood through Josef's clothing. Sonya and the Smiths' eldest son, Mykel Booth, then forced Josef into a wooden box, beating him about the head as they did so. Sonya and Mykel then tied the box shut with a cord. When Joseph later came out of the shower and removed Josef from the box, the child was barely breathing. Emergency services personnel were called to the Smiths' residence with an unresponsive child complaint, and Josef was taken to the hospital, where he later died. Numerous medical experts examined the extensive bruising throughout Josef's body and to Josef's head, and testified that the cause of Josef's death was either blunt force trauma or asphyxiation.

Smith, 288 Ga. at 349.

II. REASONS FOR NOT GRANTING THE WRIT

A. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A DUE PROCESS CLAIM RAISED FOR THE FIRST TIME IN THIS PETITION.

Petitioners first ask this Court to grant certiorari to address the question of whether a trial judge has a duty to *sua sponte* stop a prosecutor from engaging in conduct during closing argument intended to inflame the passion of the jury. (Petition, p. i). Petitioners assert that the trial court, in the absence of an objection from any party, should have intervened to stop the prosecutor from lighting candles on a birthday cake and singing "Happy Birthday" during closing argument. (Petition, pp. 9-10). Petitioners assert the prosecutor's closing argument offended the decorum and dignity of the court. *Id.* Petitioners also assert the trial court must intervene in such demonstrations and there should be consequences for the prosecutor. (Petition, p. 14). Respondent urges the Court to decline to grant certiorari on this issue, as no such substantive due process issue was raised below addressing whether the trial court should have *sua sponte* intervened during such a demonstration. The Georgia Supreme Court's review of the prosecutor's argument was in the context of trial court error and an ineffective assistance claim. The Court found Petitioner Sonya Smith's failure to object during the closing argument gave the appellate court nothing to address on appeal regarding this allegation, and both

Petitioners failed to satisfy the error prong in order to prevail on the ineffectiveness allegation.

The alleged error in question came at the beginning of the prosecution's rebuttal to the defense closing. (Feb. 14, 2007, Transcript, pp. 69-70). At the prosecutor's prompting, the courtroom lights were dimmed, a birthday cake appeared, the candles were lit, and the prosecutor sang "Happy Birthday" to the victim. *Id.* At the conclusion of the song, the prosecutor argued about how the victim did not live to see his next birthday. *Id.* Neither of the Petitioners' trial attorneys objected to the argument in question. *Id.*

In her appellant's brief, Petitioner Sonya Smith argued that "the trial court was asleep at the wheel." (Brief of Appellant Sonya Smith, p. 14). Petitioner further asserted that "[w]ith or without objection, the trial judge should have stopped the sideshow." *Id.* However, Petitioner Sonya Smith did not make a specific argument with supporting law or facts highlighting that the trial court should have acted on its own to stop the prosecution's closing argument. *Id.* Petitioner Joseph Smith did not allege the same ground on appeal. Instead, he raised the issue within the context of an ineffective assistance claim for failing to object to the prosecutor's presentation.

Following oral argument, Petitioner Sonya Smith filed a supplemental brief in the Supreme Court of Georgia addressing how the birthday cake and song arose during the trial, citing case law regarding a similar issue before the Georgia appellate courts, and

addressing whether the state "plain error" rule should apply. (Supplemental Brief of Appellant Sonya Smith, pp. 2-11).

The Georgia Supreme Court did not address whether the trial court should have *sua sponte* acted to stop the birthday cake and song in closing argument. (Petition, App. 3, 4). Respondent asserts this deficiency was caused by neither Petitioner explicitly raising the error on appeal. The idea that the trial court should have acted on its own appeared in the dissent. (Petition, App. 22).

Thus, the record in this case shows that the prosecutor's argument was only raised and reviewed in the context of whether the trial court erred by allowing the prosecution to engage in the birthday cake lighting and song, and whether the appellate court could review it under a plain error analysis. No separate, substantive due process allegation was raised as error on direct appeal. Furthermore, the claim that the trial court should have *sua sponte* intervened to stop the prosecutor's actions was not clearly and plainly spelled out in the appellant's brief. Instead, it was injected into the trial court error allegation, and an argument stating the appellate court should review them under a "plain error" analysis was inserted through a supplemental brief.

This Court should decline to permit Petitioner to raise a substantive due process claim for the first time in this petition. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). The fact that the issue was sparsely

mentioned in one of the appellate briefs and also in the dissenting opinion does not confer jurisdiction upon this Court. *See Beck v. Washington*, 369 U.S. 541, 553 (1962) ("Moreover, the failure of petitioner to argue the constitutional contention in his brief, as opposed to merely setting it forth as he did in one sentence of his 125-page brief, is considered by the Washington Supreme Court to be an abandonment or waiver of such contention.").

B. THIS COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER THE DUE PROCESS CLAIM BECAUSE, IF IT WERE TO GRANT CERTIORARI AND FIND FOR PETITIONERS, IT WOULD OVERRULE LONG-STANDING PRECEDENCE ON THE ISSUE.

Petitioner also requests this Court grant certiorari because the issue of prosecutorial misconduct is "regularly occurring in criminal trials across the country and thus the Court can address an issue of national importance." (Petition, p. 14). Without addressing the issue of whether this phenomenon is indeed widespread, Respondent submits that certiorari is not necessary because this Court has already provided guidelines for the prosecution and, if this Court were to grant certiorari and find for the Petitioners, it would be overruling precedent on the subject.

This Court does not hold that a single problem raised in closing argument is sufficient to find that a

defendant was denied due process in connection with his conviction. While closing argument is one aspect of a trial, if the remaining portions of the case show that the defendant's right to due process was sufficiently protected, then any claims about an improper remark being a due process violation must fail. *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), *citing Donnelly*.

An analysis of the Petitioners' criminal trial shows that no violation occurred which rendered the outcome of the proceedings unfair. The state's argument did not manipulate or misstate the evidence, and it did not implicate in a negative fashion any of the constitutional rights (such as the Fifth or Sixth Amendments) to which the Petitioners were entitled. *Darden* at 181-82. Thus, if this Court were to grant certiorari on this ground and rule for the Petitioners, it would have to overturn precedent this Court has already set on the issue.

Additionally, this Court historically has not delved into deciding whether each and every allegation of improper remarks by the prosecution in closing argument amounts to constitutional error. It did so in the matter of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), an Eighth Amendment case finding that a prosecutor's comment that a jury's decision to impose the death penalty was not final and reviewable by the

appellate court was improper. However, a major weighing factor in that case was the fact that the defendant was facing the death penalty. *See Caldwell*, 472 U.S. at 329. The Petitioners in the instant case did not face any such penalty.

Thus, certiorari should not be granted in this matter.

C. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO CONSIDER THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BECAUSE IT IS FACT-INTENSIVE.

In question two, Petitioners ask the Court to grant certiorari to consider "whether defense counsel rendered ineffective assistance under the sixth amendment to the Constitution when counsel failed to object to the appeal to juror sympathy and trial counsel could only offer a talismanic and unreasonable justification of 'strategy/tactics' for the failure to object." (Petition, p. i). In the petition itself, Petitioners assert that granting certiorari on this issue "offers this Court the opportunity to clarify *Strickland*'s admonition that 'scrutiny of counsel's performance must be highly deferential.'" (Petition, p. 19). Petitioners further claim that "the Defendants should have been able to count on zealous representation to stop the misconduct, but counsel was missing in action hoping that the jury would recognize the

wrongfulness on its own accord rather than having it pointed out by defense counsel." (Petition, p. 20).

The Petitioners' application for certiorari should not be granted on this issue. It is evident that the Georgia Supreme Court utilized both the correct constitutional standard when evaluating this claim, and also performed an objectively reasonable analysis of the facts applied to that standard. In short, there is nothing further for this Court to review on the issue, and certiorari is not proper.

The Georgia Supreme Court found that the ineffective assistance of counsel claims pertaining to the birthday cake and song lacked merit for the following reason:

> Counsel made a strategic decision not to object to the "Happy Birthday" song during the State's closing argument. Specifically, he preferred to remain silent during the argument rather than run the risk of offending anyone on the jury by giving the impression that he was simply trying to disrupt the prosecutor's argument. See *Braithwaite v. State*, 275 Ga. 884, 886 (2) (b) (572 SE2d 612) (2002) (where attorney "reasonably cho[oses] silence [instead of objecting to improper closing argument], . . . we will not use hindsight to second-guess that decision on appeal"). As explained more fully in Division 10 (b), infra, while this Court frowns upon the prosecutor's antics and finds them to be highly inappropriate, counsel's decision to remain silent was reasonable, considering the fact that the

> prosecutor's argument was so "preposterous" and "over the top" that it may have worked to the benefit of the defense even absent an objection. Indeed, it cannot be said that the jury may not have been alienated by the prosecutor's theatrical stunt during its closing argument, as the jury found Sonya not guilty on several of the charges against her, including two charges of felony murder, one of the first degree cruelty to children charges, and the malice murder charge.

Smith, 288 Ga. at 354(8)(h).

> Arora testified at the motion for new trial hearing that he made a strategic decision not to object to the "Happy Birthday" song during closing argument. Specifically, Arora thought that the "Happy Birthday" song was so "preposterous," "absurd," and "over the top" that "it would turn the jurors off," and that he should not call any more attention to it by objecting to it. In this regard, we must remind all prosecutors in this State that it is not their job to pursue stunts and antics during their closing arguments that are designed merely to appeal to the prejudices of jurors, but
>
> > to see that justice is done and nothing more. That duty should not be forgotten in an excess of zeal or the eager quest for victory in [any given] case. The people of the state desire merely to ascertain beyond a reasonable doubt that the accused is guilty of the crime charged, and

> do not countenance any unfairness upon the part of their representatives in court.

(Citations and punctuation omitted.) *Carr v. State*, 267 Ga. 701, 712 (10) (482 SE2d 314) (1997). Indeed, in order to ensure that the prosecutor did not let her "excess[ive] . . . zeal or the eager quest for victory in [this] case" lead her to forget her duty "to see that justice is done and nothing more" (id.), the trial court would have been well within its right to control the courtroom by putting an end to the display of the prosecutor, even absent an objection from defense counsel. See OCGA § 15-1-3 (4) ("Every court has power . . . [t]o control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto").

In any event, because it was reasonable for Arora to pursue a strategy that would allow the potentially inappropriate antics of the prosecutor to backfire against her, we find no merit to Joseph's claim that Arora provided ineffective assistance in this regard. See *Braithwaite*, supra, 275 Ga. at 885 (2) (b). In this connection, it cannot be said that Arora was incorrect in his belief that the jurors may have been turned off by the closing argument, as the jury found Joseph not guilty on several of the charges against him, including two of the felony murder charges, one of

> the first degree cruelty to children charges, and the malice murder charge.

Smith, 288 Ga. at 355-56(10)(b).

A review of the opinion shows that the Georgia Supreme Court clearly utilized the correct constitutional standard as announced in this Court's opinion in *Strickland v. Washington*, 466 U.S. 668 (1984), to decide whether the trial attorneys were effective. *See Smith*, 288 Ga. at 352. A careful analysis was conducted to first determine if there was error on either trial counsel's part; however, no such error was found. Consequently, no analysis was conducted on the second *Strickland* prong, prejudice, as none was necessary.

Furthermore, the appellate court's factual determinations about this ineffective assistance claim are supported by the record. Petitioner Joseph Smith's attorney did not object to the song because, in his characterization, the song was "over the top" and ridiculous. (MNT. dated Feb. 20, 2009, p. 10). He did not object to it because he felt that would bring undue attention to the matter, and he also hoped that the song/stunt would backfire on the prosecution and turn jurors off from their case. (MNT. dated Feb. 20, 2009, p. 41).

To necessitate an examination of this specific ineffective assistance claim, this Court would have to engage in a fact-intensive review of the record regarding trial counsels' performances and second-guess what was clearly a strategic decision. Generally, this

Court will not reexamine the state court's factual conclusions. *Hernandez v. New York*, 500 U.S. 352, 366 (1991).

This Court has held that a review of an ineffective assistance claim must not only be fact-intensive for the specific allegation, but must also take into consideration all the facts and stages of the entire criminal proceeding to determine if the specific allegation has merit:

> *Strickland* requires a reviewing court to "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*, at 690. It will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the "identified acts or omissions" overcome the presumption that counsel rendered reasonable professional assistance. Since "[there] are countless ways to provide effective assistance in any given case," *id.*, at 689, unless consideration is given to counsel's overall performance, before and at trial, it will be "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Ibid.*

Kimmelman v. Morrison, 477 U.S. 365, 386 (1986).

Thus, this Court would have to engage in a substantial fact-finding inquiry and possibly "second-guess" the state court's findings on the ineffective assistance allegations. This is an action the Court typically does not take. *Hernandez*. Furthermore, any finding that Petitioners' trial attorneys were ineffective based solely on the issue of the birthday cake and song alone would run counter to this Court's standard in *Strickland* finding that counsel's performance must be viewed in totality of the entire case.

For these reasons, this Court should decline to grant certiorari on this issue.

CONCLUSION

Wherefore, for all the above reasons, Respondent prays that this Court decline to grant certiorari.

Respectfully submitted,

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RECORD
AND
BRIEFS

No. 10-1093

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEPH SMITH and SONYA SMITH,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Georgia

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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In the Georgia Supreme Court, Petitioners' Supplemental Brief 1a

ARGUMENT IN REPLY

JOSEPH AND SONYA SMITH have petitioned this Court for a writ of certiorari to review the order of the Georgia Supreme Court denying their appeal from a Cobb County, Georgia denial of a new trial in a case resulting in a life plus thirty years sentence. Petitioners have contended, *inter alia*, that they were denied a fair trial when the government's attorney held a birthday party for the deceased child victim in front of the jury during the final moments of the rebuttal portion of closing argument.

In support of their petition, petitioner gave three reasons why certiorari should be granted:

> 1. This case affords the ideal opportunity to address the prosecutorial misconduct in a closing argument where the prosecutor deliberately stages conduct and words calculated to appeal to jurors' emotions because the Georgia Supreme Court opinion conflicts with other jurisdictions.
>
> 2. The issue of prosecutorial misconduct is a regularly occurring issue in criminal trials across the country and thus the Court can address an issue of national importance.
>
> 3. This case affords the ideal opportunity to address whether defense counsel's failure to object in the face of obvious, ongoing prosecutorial misconduct can be justified by merely claiming "strategy" or "tactics."

The Respondent, State of Georgia, chose not to address directly these reasons presented by the petitioner. The Petitioners will respond below to each of Respondent's beliefs as to why the writ should not be granted as the brief in opposition is unpersuasive.

A. THE ISSUE OF THE TRIAL COURT'S FAILURE TO STOP THE "HIGHLY INAPPROPRIATE" APPEAL TO JUROR SYMPATHY AS BEING A VIOLATION OF DUE PROCESS WAS RAISED AND DISCUSSED BEFORE THE GEORGIA SUPREME COURT.

The Respondent is incorrect to argue to this Court that the issue of whether the Trial Court's failure to stop the State's attorney inflammatory closing *sua sponte* was a due process violation is being raised for the first time in this petition. (Respondent's Brief in Opposition, p. 7). Even if the Court decided that the trial court's failure to act *sua sponte* was not raised before this petition, the ineffective assistance of counsel aspect of this issue would be unaffected.

It is an incredible assertion in light of the fact that Respondent acknowledges that Petitioner Sonya Smith enumerated as one of her errors on direct appeal the following:

* * *

> (2) the trial court erred in allowing the prosecutor to dim the lights in the courtroom, bring out a cake with lit candles, and sing "Happy Birthday" to the deceased victim during her closing argument.

(Respondent's Brief in Opposition, p. 2).

Respondent points out that in a supplemental brief that the Georgia Supreme Court granted permission to file following oral argument the first issue raised clearly states that the issue of a due process violation was part of the argument being made. (See Appendix attached hereto, Supplemental Brief of Joseph Smith). Yet the Respondent treats this briefing as not raising the issue. The supplemental brief allowed the Georgia Supreme Court to more fully grasp and consider the issue of the trial court's failure to maintain fundamentally fair proceedings. Therefore, the issue of due process is not being raised for the first time at this Court.

The supplemental brief could not have been clearer when Petitioner Joseph Smith argued, "[t]he flagrant appeal to juror sympathy corrupted the concept of fair trial implicit in the *Due Process Clause of the Fourteenth Amendment*." (App. 9a, Supplemental Brief of Joseph Smith).

Finally, the opinion of the Georgia Supreme Court clearly addresses the issue of the trial court erring in allowing the "highly inappropriate"[1] closing argument. The Georgia Supreme Court sidestepped the issue by stating it would not consider plain error and noted that trial counsel had not objected. (Petition for

---

[1] The Georgia Supreme Court stated in its opinion below that it "frowns upon the prosecutor's antics and finds them to be highly inappropriate." (Petition for Writ of Certiorari, App. 12).

Writ of Certiorari, App. 3-4). Nevertheless the concept of the due process being raised is implicit in the first section of the dissent by Chief Justice Hunstein. (Petition for Writ of Certiorari, App. 17-23). The dissent makes clear that the lack of fundamental fairness of the closing argument antics was raised both as failure on the part of both trial court and defense trial counsel.

The issue of the trial court's failure to stop the highly inappropriate antics, as well as ineffective assistance of counsel for failure to object, is properly before the Court.

B. PETITIONERS ARE NOT ASKING THIS COURT TO OVERRULE ANY LONG-STANDING PRECEDENT.

The Respondent's argument is based on desired, boilerplate conjecture. It is not clear what long-standing precedent the Respondent claims the Petitioners seek to have overruled. The Petitioners know of no United States Supreme Court case that would justify a prosecutor to stage an elaborate appeal to sympathy by holding a birthday party for the deceased victim in a murder case in closing argument, and further approve defense trial counsel's silence in the face of such highly inappropriate antics.

Indeed Petitioners seek the enforcement of long-standing precedent that trials be fair and not circuses that appeal to emotion. The Petitioners are asking the Court to provide guidance on prosecutorial

misconduct in closing argument and on effective assistance of counsel in objecting to the misconduct rather than relying on a pretextual strategy of silence. The Court may clarify its previous rulings, but the Petitioners cannot imagine the Court would overrule any prior cases.

C. THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS NOT "FACT-INTENSIVE" – BOTH IN GENERAL AND IN COMPARISON TO ANY OTHER CASE THAT WOULD BE BROUGHT BEFORE THIS COURT.

The underlying case involves a real factual dispute about the cause of the death of a child in a criminal case. The case is no more fact-intensive than any other case brought before this Court.

There is also no factual dispute about the antics in closing argument by the prosecutor. Nor is there a factual dispute as to a claim of strategy by defense counsel. This Court would be called upon to consider the reasonableness of the failure to object so as not to call further attention to the circus-like, prosecutor-created atmosphere in closing argument or in hopes that the jury will do defense counsel's job and hold the appeal to sympathy against the State. However, this assessment of facts is not exceptionally intensive.

In short, this argument is meaningless.

This Court should grant the writ of certiorari in this case so that an obvious injustice can be avoided

and so that judges, prosecutors, and defense counsel can have guidance as to when misconduct in closing argument crosses the line.

CONCLUSION

For the foregoing reasons, and for the reasons discussed more fully in their Petition, JOSEPH AND SONYA SMITH pray that this Court grant their petition for a writ of certiorari, and reverse the judgment below.

Respectfully submitted,

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IN THE SUPREME COURT OF GEORGIA

JOSEPH SMITH, APPELLANT v. STATE OF GEORGIA APPELLEE	))))))	Case No. S10A1282 DIRECT APPEAL FROM COBB COUNTY

SUPPLEMENTAL BRIEF OF APPELLANT, JOSEPH SMITH

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SUPPLEMENTAL ARGUMENT

The Defendants' due process rights and their Sixth Amendment right to effective legal counsel were denied by the prosecutor's intentional, outrageous appeal to the jury's emotions and sympathies by the State's attorney lighting a

birthday cake and singing "Happy Birthday" to the Defendants' dead son in the final words/ stunt before jury deliberation.

In the rebuttal portion of closing argument, Assistant District Attorney ("ADA") Eleanor Dixon said ***and sang*** (the singing portion will be in italics) the following while an actual birthday cake and eight candles were burning, having been lit by State's counsel:

> I was thinking about something the other day. I was thinking about birthdays. *Happy birthday to you. Happy birthday to you. Happy birthday dear Josef. Happy birthday to you.*
>
> There are eight candles on that cake. But you know what's not on there? One more candle for his 9th birthday, because he didn't get to see that. You may think that's harsh, but it's true. And it was at the hands of those people.
>
> You are the voice of the community. You can stand up and say to Cobb County, We do not let parents abuse their children to the point in which they die. You, as the community, can say that. We don't accept this behavior in our community. This is not what we do to children.
>
> When you were sworn in as jurors, you took an oath to render a verdict which speaks the truth. And a verdict which speaks the truth in this case is a verdict of guilty on each and

> every count in the Indictment. **Speak the truth for little Josef**[1].

(T- Volume 8, State's Closing Argument on February 14, 2007, p. 69-70) (Emphasis added).

At the motion for new trial hearing, Manubir Arora described the events and his reaction as follows:

> Q. I think I know the answer to this next question but I'll ask you to make the record. Why didn't you object to the birthday cake stunt?
>
> A. I think I was just stunned about it. I **had never had a prosecutor go to that extent where she clicked her finger, one of the deputies turned out the lights and her associate popped out a cake out of a grocery bag and they just started singing** but the birthday had already come and gone and I understand the cameras were rolling and everybody wants to be Nancy Grace's friend but I was so stunned by it. I didn't want to call any more attention because I thought it was so absurd I was hoping it would turn the jurors off. That was the only thing I could think of but I couldn't come up with a rational reason except for this is so

---

[1] As to the remark, "Speak the truth for little Josef", it is well settled that it is improper to ask the jury to imagine themselves in the victim's place. ***Pace v. State***, 271 Ga. 829, 844, 524 S.E.2d 490 (1999).

> preposterous, I object. **I couldn't come up with a law because I was stunned.**

Testimony of Manubir Arora, Hearing for Motion for New Trial on February 20, 2009, p. 41-42

The Court has allowed this supplemental briefing as to caselaw regarding egregious closing arguments.

Looking first to persuasive authority from other jurisdictions of where the sheer flagrant nature of the appeal to passion and prejudice lead to reversal, the Appellant, Joseph Smith, would direct the Court's attention to ***State of South Carolina v. Northcutt***, 372 S.C. 207, 641 S.E.2d 873 (2007). The Supreme Court of South Carolina held, *inter alia*, the State's improper comments and action during closing argument of sentencing phase constituted reversible error. The *Northcutt* court found that the State had infected the jury's deliberations with passion and prejudice so as to require reversal. The solicitor concluded his argument in a child murder case by producing a large black shroud and draping it over the baby's crib and then staged a funeral procession for the jury. Trial counsel had not objected at trial.

In ***State v. Lockhart***, 24 Kan. App. 2d 488, 947 P.2d 461 (1997), the prosecuting attorney called the defendant and defense counsel liars and the defendant a drug dealer in an attempt to appeal to the jury's passions . The court in reversing and remanding for a new trial stated that "[j]uries must be given an opportunity to exercise reason and sound judgment in deciding the facts of a case, free from passion and

prejudice." *Lockhart*, 24 Kan. App. 2d at 492, 947 P.2d 463. The court noted that it could not conclude beyond a reasonable doubt that the prosecutor's statements had no effect on the jury's decision.

In ***United States v. Payne***, 2 F.3d 706 (6th Cir. 1993), the Sixth Circuit Court of Appeals reversed a conviction where the prosecutor made deliberate, improper closing argument referencing Christmas and the plight of poor people as a calculated effort, at a trial held shortly before Christmas, to evoke strong sympathetic emotion for the victims. The court found that there was prejudice to the Defendant despite objection and curative instructions.

The controlling authority most relevant to the present case is ***Bell v. State***, 263 Ga. 776, 439 S.E.2d 480 (1994). In *Bell*, this Court reversed a conviction because prosecutor in drug trial closing argument referred to a well-known murder case and a rape case. Justice Benham wrote for the Court in Bell the following (with emphasis added):

> [T]he court must not allow such latitude as will defeat the justice of the cause, such as introducing prejudicial matters not in evidence. ***The dignity of the court, and the public interest in having its courts properly conducted, are involved. Brooks v. State***, 262 Ga. 242, 416 S.E.2d 518 (1992) (where the prosecutor's reference in closing argument in a murder case to a widely-publicized murder was not enumerated as error), and ***Cooper v. State***, 260 Ga. 549,

> 397 S.E.2d 705 (1990) (where the prosecutor's reference in closing argument in a murder case to a well-known murder and to a notorious sexual assault was not the subject of a motion for mistrial or a request for curative instructions).
>
> We take this opportunity to reiterate that the wide range of discussion permitted in closing argument does have its limitations, the first and foremost of which is the longstanding ***prohibition against "'the injection into the argument of extrinsic and prejudicial matters which have no basis in the evidence.'" Conner v. State***, 251 Ga. 113, 303 S.E.2d 266 (1983), quoting ***Floyd v. State***, 261 Ga. 766, 410 S.E.2d 725 (1991). By referring to such extraneous and prejudicially inflammatory material in her closing argument, the prosecutor exceeded the wide latitude of closing argument, to the detriment of the accused and to the detriment of the fair administration of justice.

The present case involves conduct far more flagrant and inflammatory than the acts referenced in *Bell*. The prosecutor in the present case scripted, pre-planned, and musically scored the diversion of the jury's attention from whether the Defendant was a mere victim of staph infection to an emotional based decision that the parents had abused and killed their child.

The "Happy Birthday" closing was not an isolated or inadvertent act or word over the course of a hard

fought case. The message that should be sent is that when a prosecutor pre-plans to inject emotion into closing argument; such intentional misconduct will be met with reversal as it violates the due process right to a fundamentally fair trial. Otherwise prosecutors will know that they can go to extremes, and even then, might not be held accountable for corrupting fair, objective, unemotional fact evaluation by a sworn jury.[2]

This highly improper appeal for the jurors to give emotional consideration to the victim in the guilt-innocence phase and for the jurors to put themselves in the place of the victim can only be fully understood by viewing the video recording.[3]

The starting point for analysis is to look at the obligations of the prosecutor in giving a closing argument.

> [A prosecuting attorney] is the representative not of an ordinary party to a controversy,

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[2] There is no doubt that the vast majority of cases considering the issue of prosecutorial misconduct are held not to be reversible error. The present case is distinguishable by the sheer deliberateness and intense flagrancy which involves more than a mere isolated, poor choice words. The issue is raised far more than the cases cited here which, in and of itself, suggests that prosecutors are not restrained by the rule prohibiting appeals to sympathy and emotion.

[3] The video was submitted at the motion for new trial hearing on February 5, 2009 as Exhibit 1. (R- p. 314). The video of the closing argument was submitted under seal for inclusion in the court record.

> but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. **It is as much his duty *to refrain from improper methods* calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.**
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, ***improper suggestions, insinuations, and, especially, assertions of personal knowledge*** **are apt to carry much weight against the accused when they should properly carry none.**

Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

In less poetic language, the American Bar Association Standards for Criminal Justice 3-5.8 (2d ed. 1980) provides:

(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

(b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.

(d) The prosecutor should refrain from argument which would *divert the jury* from its duty to decide the case on the evidence.

The actions of the Assistant District Attorney in the rebuttal rebuttal portion of closing argument are far outside the parameters of the *Berger*'s or the ABA's concept of a fair prosecution; indeed it is so outrageous and improper that no court should accept singing and showmanship of this nature with no real relevance to the evidence. The flagrant appeal to juror sympathy corrupted the concept of a fair trial implicit in the *Due Process Clause of the Fourteenth Amendment*. The final, over-the-top scene of the rebuttal in the present case was plain error such that the trial court should have stopped the State before the ADA sang the first note much less an entire chorus, before the first candle rather the eighth was lit.

Violations of the Fourteenth Amendment occur when something "so infects the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Because the stunt was submitted to jury during rebuttal of closing argument the Defendants had no opportunity to even be heard on the matter of whether the jury should properly consider the State's proposition that the victim did not get to have a 9th birthday.

Further the Sixth Amendment of the United States Constitution was implicated by defense counsel's failure to object. Georgia courts "have recognized that trial counsel's failure to object to improper argument can constitute deficient performance. ***Williams v. State***, 261 Ga.App. 511, 583 S.E.2d 172 (2003) (citing to *inter alia* ***Mason v. State***, 274 Ga. 79, 548 S.E.2d 298 (2001)).

No evidence was entered at trial regarding cakes or candles or singing. The prosecuting attorney's only objective was to inject emotions into the jury just as they begin deliberation. The State's flagrant violation is so overwhelming that there is a reasonable probability that the jurors deliberated and decided the case with a background of an emotional need to ensure that the victim be vindicated. Such emotion often tips the balance and unfairly compromises a verdict thus denying the Defendants' due process.

This evidence in this case was not overwhelming. The Defense presented a viable theory that the child

died as the result of staph infection from infected scratching due to eczema. The Defense presented expert testimony to support this theory. The Defense showed video of the child playing at a summer camp, and incidentally scratching his leg. (T- Vol. 6A, February 12, 2007, Exhibit 8, p. 33).

The Defense would present a claim centered on the cause of death being attributable to staph infection from the scratch wounds due to eczema rather than any human caused injury. Dr. Cheryl Burgess, an Assistant Clinical Professor at Georgetown University and George Washington University, testified that the wounds and markings on the victim's body were due to eczema and scratching associated therewith. (T- Vol. 6B, February 12, 2007, p. 43.84). Dr. Burgess noted that based on the white blood cell count and the fever of 102.5 degrees, an infection was present in the child. (T- Vol. 6B, February 12, 2007, p. 104-105, 108).

Dr. Thomas Sporn, an assistant professor in Pathology at Duke University and former Assistant Chief Medical Examiner for the State of North Carolina, testified on behalf of the defense. (T- Vol. 6A, February 12, 2007, p. 66, 69). Based on his review of the autopsy reports, glass slides taken by the pathologist, photographs, and other documentation, Dr. Sporn rejected Dr. Frist's theory of blunt force injuries to the head. (T- Vol. 6A, February 12, 2007, p. 70-73). Dr. Sporn acknowledged it would be difficult to put "a struggling, healthy child in a box with dimensions" as the box shown in the courtroom.

(T- Vol. 6A, February 12, 2007, p. 85). He noted the lack of trace evidence on the body such as flecks of paint or wood splinters that would be expected if the body had been placed in the box. (T- Vol. 6A, February 12, 2007, p. 86-88).

CONCLUSION

Wherefore, based on the foregoing, the Appellant asks this Court to reverse the trial court's order denying a new trial and remand this case back to the trial court so that Joseph and Sonya Smith can have a fair trial without extraneous appeals to sympathy that compromise due process.

Respectfully submitted,

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